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THE OFFICE OF THE LORD CHANCELLOR

LORD SCHUSTER

THIS paper reproduces part of a lecture which I delivered in July to the students attending the special course for foreign lawyers in the University of Cambridge. Its theme was a consideration of Montesquieu's theory of the separation of powers in the British Constitution illustrated by the position of the Lord Chancellor. Being addressed to foreign students, it was largely elementary in character. But some of those who heard it thought that parts of it had a more permanent value. This is an attempt to adapt it so as to render it more suitable for *The Cambridge Law Journal.*

The Lord Chancellor is the President of the House of Lords as the Supreme Appellate Court for England, Scotland and Northern Ireland and of the Supreme Court of what is sometimes called the Empire, and sometimes called the British Commonwealth of Nations, the Judicial Committee of the Privy Council, the Supreme Appellate Tribunal from the superior courts of such of the British dominions as choose that appeals from their courts shall come there, and from all other dominions of the Crown. He is also by statute the President of the Supreme Court of Judicature constituted under the Acts of 1873 and 1875, though he very seldom sits as a judge except in the House of Lords or in the Judicial Committee. The fact that he is President of the Supreme Court lays upon him many administrative duties, to which I shall recur when describing his many-sided functions in the Constitution. He is also a member of the Executive Government, and he is both Speaker of the House of Lords and a prominent Government representative in the conduct of the legislative business of that House. He is therefore in himself a combination of the three functions, judicial, executive and legislative. As a judge in his origin he sat alone in his Court of Chancery, deciding disputes between parties like any other judge. Keeping the King's conscience, as he is said to do, he could exercise an influence over the course of the law by the issue from his Chancery of a writ designed to correct grievances of which the Common Law could take no cognisance. Thus he acquired a special relation to wards of court, to the execution of trusts and to married women in relation to their property. He is in a special sense the protector of persons of unsound mind. Much of the personal exercise of this jurisdiction has passed from him. All divisions of the High Court

of Justice administer law and equity, matters peculiarly equitable in their origin or in their practice being assigned to the judges of the Chancery Division of that court. To these judges, also, severally, has been handed over the care of those persons under age who have been committed as wards to the care of the court.

Next, the Lord Chancellor is the Speaker of the House of Lords. When he has sat from ten-thirty to four o'clock as President of that House doing judicial business, he returns to his room. He changes the black trousers, in which he has exercised his judicial function, for knee breeches, silk stockings and buckled shoes and, still wearing the great wig which has been on his head all the morning, he resumes his seat on the Woolsack as President of that House discharging its legislative function. But his powers are somewhat less and somewhat greater than those of the Speaker of the House of Commons. He cannot call a member to order, and he cannot suppress irrelevance. He cannot interpret with authority the rules of the House. He can express an opinion on a matter of procedure or on a matter of law if he is appealed to, or he may even intervene and express his opinion unasked. But the opinion so expressed is nothing but an opinion, though his office is held in such respect, and his person has such prestige, that it carries great weight and is apt to be taken as decisive. On the other hand, he can do what the Speaker cannot. He can, and often does, take an active part in debate. The change which takes place from his function as Speaker to that of legislator is marked by a curious custom. He puts the question which the House is to decide, standing immediately in front of the Woolsack. When he is about to address the House on some topic, whether controversial or otherwise, he steps slightly aside to the left, and thus becomes the statesman or politician instead of the Speaker. When the House is in committee, and the Chairmanship devolves from the Lord Chancellor on the Lord Chairman (an official chosen from among the peers for this purpose), he leaves the Woolsack. The Lord Chairman takes a seat at the front of the Woolsack at the Table of the House, and the Lord Chancellor himself takes his seat on the front Government Bench. He then takes the same part in debate as if he were an ordinary member of the Government and becomes on occasion a sharp controversialist. Even then the respect and prestige, which he derives both from his office and from his personal history, still cling round him. The House is still willing to hear whatever he may have to say, particularly on the legal aspect of any question which arises, and is still inclined to attach importance to it. Furthermore, the Lord Chancellor has often been sitting throughout the day on some legal question in

company with some political opponent, who has himself previously occupied the Woolsack, and their discussion of that question has proceeded without the intrusion of any political matter. The communion between the two minds thus formed in the pursuit of a common object is seldom wholly dissolved when the political issue takes the place of the legal dispute. And, however bitterly opposed the two men may be on that political issue, the previous companionship to some extent softens their manners and does not allow them to become ferocious.

The next function of the Lord Chancellor concerns the appointment of judges. All judges of the Supreme Court are appointed by the King by Letters Patent. But His Majesty exercises this function upon the advice of his Ministers, and the responsibility for giving that advice is divided between the Lord Chancellor and the Prime Minister. The duty of making recommendations for the appointment of the Lord Chief Justice of England, of the Master of the Rolls and of the President of the Probate, Divorce and Admiralty Division of the High Court, as well as of the eight judges who constitute the ordinary working members of the Court of Appeal, and who are designated as Lords Justices, rests with the Prime Minister. The recommendation in respect of all the other judges of the Supreme Court rests with the Lord Chancellor. This is perhaps too great a simplification. The Lord Chancellor is the chief legal personage in the Cabinet. It is not to be supposed that the Prime Minister, when selecting those whom he should recommend for appointment, neglects to consult the man whom he has himself chosen to be his chief legal colleague, and who possesses by his long experience an unequalled knowledge of the work which the judges have to perform, and of the capacities and aptitudes of those from among whom the choice must be made. It is almost impossible for the successful advocate to reach the Woolsack except after a long apprenticeship in the political as well as the forensic arena. And no one could hold that office unless he were in close political sympathy with the Government of the day, for he must sit in the Cabinet and, in the many problems which concern that body, while he no doubt brings to the discussion occurring at their meetings that influence which arises from his long familiarity with legal and constitutional questions, he must also concern himself with political issues. Oddly enough, two Lord Chancellors in recent years (the late Lord Sankey and the present Lord Maugham) had at the time of their respective appointments taken no prominent part in politics, but each of them was in sympathy with the party in power and was, during his tenure of office, a political as well as a legal protagonist on behalf of his party in the House of Lords.

The Lord Chief Justice, however, from the moment that he enters upon his office dissociates himself wholly from the party to which he once belonged. If he intervenes in debate in the House of Lords he does so without regard to any political affiliation, bringing to the discussion rather the weight which comes from his legal knowledge and experience than the spirit of the partisan.

As to the other appointments to the Supreme Court there is a popular belief that service to the political party at the moment in power is a strong influence upon the advice tendered to the Crown. This is a profound error. It would be a misfortune if the fact that a man had served in Parliament was to be a cause of his exclusion from the Bench. It is desirable that some at least of those by whom justice is administered should have had that contact with popular opinion which almost necessarily precedes election to the House of Commons, and should have there learned how laws are made and how the minds of men engaged in making them are swayed. It must be expected therefore that Members of Parliament should on occasion reach the Bench. But very few of the Lords Justices of the Court of Appeal and judges of the High Court have ever taken any part in politics. A man spends the greater part of his life in practice, acquiring not only the habits but the spirit of the advocate, responsible indeed to the Inn of Court which called him, if he should deviate from those rules which by the tradition of the Bar should govern his conduct, but otherwise responsible to no one but to his client and himself. The independence of the judge on which we lay so much stress depends therefore not so much on the fact that the judicial office is separate from the executive, as on the fact that from his earliest professional days the advocate is taught independence of mind, the freedom within well-recognised rules and traditions to express his opinion—and, above all, since he frequently begins his career as a defender of prisoners, to respect the power of the Executive Government only when it is exercised in accordance with those ideas of liberty and fairness which have matured here over many years.

This business of the appointment of judges is one of the most responsible and most difficult of the duties which the Lord Chancellor has to discharge. He alone is responsible for the advice which he gives to His Majesty and he must expect, if he should make appointments from any other motive than a desire to get the best man, to incur the criticism of informed professional opinion. High office, no doubt, separates a man from his fellows; and the office of the judge, who is in his own court omnipotent, may tend to lead a man to think that by his unaided genius he should be considered omnipotent everywhere. But in truth judges, and even

the Lord Chancellor, do not live in isolation. As a man rises in the profession and becomes a Member of the Bench of his Inn, he is constantly subject to the pressure of the opinion of his fellows with whom he lunches every day. Up to some seventy or eighty years ago, when a man became a judge he was drummed out of his Inn, and became a member of a society called Serjeants' Inn, composed solely, or almost solely, of other judges. Serjeants' Inn has disappeared, and the judge remains in the Inn by which he was originally called. He may happen to sit next at lunch to the counsel who addressed him in the morning; he takes part in the governance of the Inn and there he is on an equality with the most recently elected Bencher, except in so far as his added years and experience in themselves demand respect.

It is impossible to say that where the appointment of the judges rests with one or the other of two great officers of the Executive Government there is a complete severance between the two functions. A judge, once appointed, is in practice irremovable. The Act of Settlement renders it possible to remove a judge by resolutions passed in both Houses of Parliament. But in the two hundred and fifty years or so which have passed since it became law no English judge has ever been so removed. It would have been possible for successive Lord Chancellors, as judgeships fell vacant, to infiltrate the Bench as a whole with persons of their own political faith. Such a process, however, would necessarily have been very slow, and the Lord Chancellor is restrained, if he has any tendency to deviate from impartiality, by the force both of informed professional opinion and even of uninformed political opinion. Beyond this, Montesquieu perhaps builded better than he knew. It may be that the doctrine which he stated has hardened into truth. It is certain now that the judges are independent; and it is an accepted commonplace that upon their independence from any pressure or influence from the executive arm our liberties depend.

The judges of the Supreme Court are not the only judicial appointments with which the Lord Chancellor is concerned. He also appoints all the county court judges and can remove any such judge for misbehaviour, and he has in his gift other appointments of inferior officials both in the Supreme Court and in the county court.

Next it is to be noticed that the Lord Chancellor is the chief legal adviser to the Crown. It is his duty not only to defend Government policy and Government measures in the House of Lords, but also himself to initiate such legislation as may be required on matters relating to the administration of law. The

main structure of the administration of the superior courts of law depends on the Acts of 1873 and 1875, though those Acts, with the numerous statutes which amended them from time to time, were put together in one Act in 1925. But in the last twenty-three years the Act of 1925 has been amended again and again. The plan which dictated the unification of the superior courts in one court still remains; but as the years have passed small defects have been remedied, and that plan has been made to serve modern changes and exigencies. Meanwhile the duty of laying down in detail the procedure of this court has been committed to a special legislative body, constituted by the Acts of 1873 and 1875. For many years each superior court has assumed the power of regulating its own procedure. The Acts of 1873 and 1875 conferred this power upon a body called the Rule Committee of the Supreme Court. Its President is the Lord Chancellor. It comprises the Lord Chief Justice, the Master of the Rolls and the President of the Probate, Divorce and Admiralty Division, with certain other judges and members of the Bar and members of the solicitors' profession, chosen by the Lord Chancellor for the purpose. The rules made by this body have to be laid before both Houses of Parliament and could be annulled by them. In practice Parliament leaves these matters to those who may be supposed to know more about them. The line between legislation on procedure and legislation on substantive right is difficult to define; and, if the Rule Committee had chosen to amplify its jurisdiction by dealing with matters which lay outside its function, its usefulness might have been impaired. On the other hand, if procedure as well as substantive right could have been reformed and adapted to modern needs only by legislative proceedings in Parliament, the system would have become ossified. Our modern system, whatever may be its faults, is certainly easily adaptable. Indeed it may be said that it is flexible to excess, for the result of the labours of the Rule Committee is a code of procedure so enormous in size that it is easy to lose your way in it. And there has grown up a gigantic volume interpreting and explaining, by the citation of judicial decisions, the rules of the Supreme Court. The main feature to note, however, is that you here have a body, composed almost wholly of judicial personages, exercising legislative powers; and as the secretariat of the Committee is contained in the secretariat of the Lord Chancellor, the mingling in his person of the legislative and executive functions is once more displayed.

As I have ventured so far in the description of the Lord Chancellor's functions I ought shortly to notice others which he discharges.

First, it follows from the fact that he is President of the Supreme Court and is responsible for the administration of the county courts that he is responsible for the collection and care of a very large sum of public money. Both courts collect considerable sums as fees, and have the care of large sums of money belonging to the suitors in them. In the administration of what would in old days have been proceedings in Chancery, there is put into the care of the court money which is in dispute or requires protection from some litigating party or another. On the King's Bench side money recovered in damages on behalf of people under a legal disability, such as minor children or persons of unsound mind, is paid into court and distributed under the court's direction. Furthermore, a defendant in an action, though admitting a liability to pay damages, frequently denies the estimate set upon them by the plaintiff and pays into court such sum as he thinks can reasonably be demanded of him, hoping thereby to escape payment of the costs of the action. The Lord Chancellor therefore has the care of other people's money, which is looked after in a department called the Pay Office, and is under the obligation out of moneys otherwise committed to him to pay the salaries of officials in both sets of courts. The process whereby legal officials (including the judges) became remunerated by salaries was slow. Originally officials were remunerated out of fees taken in the courts and judges were remunerated, partly by fees and, as far as the Lord Chancellor and the chiefs of the Common Law courts were concerned, by the sale of offices to which they had the right to appoint. So long ago as 1551 an Act of Parliament forbade the sale of any office concerned with the administration of justice though it excepted from this provision offices in the gift of the Chief Justices of the King's Bench and of the Common Pleas and of the Judges of Assize, and offices in these gifts continued to be saleable until the year 1825. The Act of 1551 did not except offices in the gift of the Lord Chancellor, but the Lord Chancellor paid little or no attention to the prohibition. Among the most valuable offices in his gift were those of the Masters in Chancery. They had the care of the suitors' money, and they earned handsome incomes out of the interest on that money for which they were under no obligation to account to the suitors. In 1718 Parker, Lord Chief Justice of the Common Pleas, became Lord Chancellor as Lord Macclesfield, and he seems to have exacted from those whom he appointed to vacant Masterships in Chancery sums which were in excess of what was considered to be their market value. In the catastrophe which followed he was most unfortunate for, except in the extent of his exactions, he had done little more than his predecessors. One Master described what had taken place. He said,

'I spoke to Mr. Cottingham (the then Lord Chancellor's principal secretary) and told him I had been at My Lord's and My Lord was pleased to speak very kindly to me and had proposed to give him £5,000. Mr. Cottingham answered, "Guineas are handsomer"'.

More unfortunately still, Parker's tenure of office happened to coincide with an era of violent and extravagant speculation. Masters in Chancery, having paid more for their offices than they were worth, were anxious to reimburse themselves as quickly as possible, and they invested the funds under their care in the South Sea Bubble. The Bubble burst and nothing was left. One of those whose funds were involved was the Duchess Dowager of Montagu (the Mad Duchess who supposed herself to be the Empress of China). Her guardians were two members of the House of Lords. An inquiry was held. Macclesfield was impeached, deprived of his office, sent to the Tower and fined £50,000.

In addition to the punishment inflicted on Lord Macclesfield steps were taken to put the house in order generally. Money was still paid into court, and paid out upon the order of the court. But the care of the money was entrusted to the Bank of England, and steps were taken to see that the court officials could have no access to it except for the purposes of obeying the orders of the court. An Accountant-General of the Court of Chancery was established, and remained in existence for one hundred and fifty years, when his duties passed by statute to an official known as the Assistant Paymaster for Supreme Court business. The Assistant Paymaster was appointed by, and was responsible to, the Treasury, and not to the Lord Chancellor. There was thus established a severance from the Lord Chancellor's office of an important part of his executive duties. This arrangement endured rather more than fifty years. But the result was extremely inconvenient. The Lord Chancellor was not responsible to Parliament for the expenses of his office, which were accounted for and defended before the Public Accounts Committee of the House of Commons by a Treasury official. This division of administrative and financial responsibility had its natural effect. In the course of years, though the old evils arising from the eighteenth century view that public money might rightly be used by those who handled it to their own private advantage had disappeared, there were still officers in existence who had outgrown their usefulness. Everyone is familiar with the name of Mr. Gladstone as a great reformer; most people, while they remember the feats of legislation which distinguished his administration, forget that he effected changes in methods of administration, and still more in the attitude of officials towards administration, and towards public money, which had very far-reaching effects. These

methods and this new attitude had but little effect upon the administration of the legal offices, partly because the Lord Chancellor was without any permanent office staff, and partly also because such staff as there was was excepted from the general structure of civil administration. The second of these causes was removed when first, in 1924, the Vote Office, which was concerned with the payment of salaries, and second, in 1925, the Pay Office, which was concerned with the care of the suitors' money, were transferred by Treasury minute and by statute to the care of the Lord Chancellor. His Permanent Secretary became the Accountant-General of the Supreme Court, and himself appeared before the Public Accounts Committee of the House of Commons to explain, and if necessary to defend, the details of his administration.

Before that happened, however, it had been necessary to create a permanent staff for the Lord Chancellor by whom these duties might be performed.

During the seventeenth, eighteenth and a great part of the nineteenth century there had gradually been erected round the Lord Chancellor a number of legal offices and legal officials, over some of whom the Lord Chancellor exercised a certain suzerainty, though, as the appointments to some of them were made by Letters Patent under the Great Seal and were for life, he had very little control. The Great Seal itself was affixed with great ceremony and accompanied by the taking of fees. In the court itself there were the Masters in Chancery, a Register of the Court of Chancery, a Register of Affidavits, the Six Clerks, the Sworn Clerks, the Waiting Clerks and the Clerks of Enrolments, whose intricate duties and manœuvres were mainly directed to making sure that the business of the court should not proceed too fast, and that sufficient toll was taken from those who resorted to it. It would require much learning and a volume of many pages to describe their proceedings in detail. Closer to the Lord Chancellor were the Principal Secretary (of whom more hereinafter), the Secretary of Presentations, and the Secretary of Commissions, of whom the former was concerned with the Lord Chancellor's ecclesiastical patronage and held office during the Lord Chancellor's pleasure, sharing his duties with the Clerk of the Presentations who held office by Letters Patent (the office having been in existence since the first year of King Edward VI). The Secretary of Commissions was concerned with the appointment of Justices of the Peace. He also held office during the Lord Chancellor's pleasure. There were also the Secretary of the Commissions of Bankrupts, the Clerk of the Enrolments in Bankruptcy, the Office of the Execution of the Law and Statutes concerning Bankrupts, the Secretary of Decrees and Injunctions,

the Secretary of the Briefs, the Secretary of the Appeals, the Clerk of the Appeals, the Secretary of Lunatics, the Clerk of the Custodies of Idiots and Lunatics, the Purse Bearer, and the Gentlemen of the Chamber attending the Great Seal. Many of these offices had existed since the middle of the seventeenth century or earlier, and the origin of many of them is wrapped in mystery. Commissioners were appointed in 1732 'to make a diligent and particular survey and view of all Officers, Clerks and Ministers, of and within the Court of Chancery . . . and what extortions, expressions and exactions have been used or committed by any of the said officers, clerks or ministers, or any of the substitutes or under clerks in the execution of their several offices or places'. Sometimes they met with great difficulties; for instance, when considering the Clerk of the Custodies of Idiots and Lunatics, they say, 'The searches that may be necessary to be made, may take up a considerable time', and therefore thought it not worth while to pursue the subject.

But in addition there were in existence the Great Seal offices, properly so called, and particularly the Clerk of the Hanaper in Chancery, 'a very ancient office granted by patent under the Great Seal', the Clerks of the Petty Bag ('The Petty Bag is, and time immemorial hath been, an Office of Record in the Court of Chancery'), the Prothonotary, an ancient office which 'doth and ought of right to belong to the Court of Chancery, and is principally for the despatch of such business as is for His Majesty's Service, as, the writing, passing under the Great Seal, and inrolling, of all Commissions, Treaties, Leagues and other instruments, which pass between His Majesty and all other Kings, princes and states'. We must not forget the Cursitors, the Subpoena Office, the Sixpenny Writ Office, Chaff Wax, the Sealer, and the Usher of the Court, and last but not least important, the Clerk of the Crown of the Chancery of England.

The Hanaper, which is supposed to draw its name from a hamper in which the instruments conveying royal grants were kept, and the Clerkship of the Crown, were correlative offices, each of them concerned with the affixing of the Great Seal and each of them collecting fees, from which their own emoluments were drawn, but which also provided substantial sums for the payment of other officials, for the Lord Chancellor, and for the Sovereign. They were patent offices, that is to say appointments to them were made by Letters Patent, and they were held on a life tenure, and the duties of each were usually discharged by deputy. In 1740 the office of Clerk of the Hanaper was held by James, Duke of Chandos, to whom it had been granted to hold in reversion on the death of the then joint holders 'during the lives of his two sons and the life

of the survivor, to be executed by himself or deputy'. It is impossible to ascertain exactly what emoluments the Duke drew from his office. His 'ancient wages' were 6d. a day with certain allowances; for example: 'For the Wages of a Boy under him, to keep the Horse that carries the Wax and Parchment for the Rolls and Books of the Chancery, at 4½d. a day . . . for livery for the Deputy Clerk, for livery for the boy keeping the Horse that carries the Wax, for a winter livery against Christmas, for a summer livery against Whitsuntide, for Bags to carry the Writs, Letters Patent, Charters and Papers, for carrying the Writs, etc., from London to Westminster and from Westminster to London and divers other places, and for waterage, for sundry petty charges relating to the Sumpter Horse carrying the Hanaper', but these were only the small perquisites. His main remuneration came from his share in the profits of numerous other offices and from the fees taken on numerous kinds of commissions under the Great Seal. The fees did not go wholly into his own pocket. Thus, the fee on a Special Commission for pardoning pirates was £6 13s. 4d. Of this the King got 16s. 4d.; the Lord Chancellor 2s.; the Master of the Rolls 2s.; the Six Clerks £1; the Sealer 8d.; Chaff Wax 4d.; the Examiner 8d.; leaving £4 11s. 4d. for the Clerk himself. In 1831 the Clerk of the Hanaper, after paying his deputy, who also received fees for his own use, made a net profit of £4,388.

Looking at it from the other end, the Lord Chancellor in 1831 received £17,731 5s. 7d., made up of a salary from the Exchequer of £5,000, £4,250 from the Secretary of Bankrupts, £2,127 from the Purse Bearer, £693 from the Secretary of Fines, £309 from the Clerk of the Crown, £305 from the Clerk of the Letters Patent, £1,125 from the Clerk of the Hanaper, and £4,089 from fees of the House of Lords. Out of this sum he had to pay £2,500 to the Vice-Chancellor, £450 for rent tax, and £75 for writ duty, leaving £14,706 5s. 7d. as his net official income. In the same year the Clerk of the Crown made £3,309, which was more than his annual average because the number of peers created in that year was unusually large.

All these offices, except that of the Clerk of the Crown, were gradually swept away by statute during the nineteenth century. The Bankruptcy business has gone in part to the Board of Trade and in part to a special department of the Supreme Court. The Lunacy business, so far as it relates to the custody of the persons of the sufferers, has gone to the Board of Control, a subordinate department of the Ministry of Health, and so far as it relates to the property of persons of unsound mind, to the Master in Lunacy and the Lords Justices. The Lord Chancellor, however, still

exercises some supervision in lunacy matters. Three officials called the Lord Chancellor's Visitors in Lunacy make periodical visits to all those lunatics whose property is now in the care of the Master in Lunacy, and report not only to that official but to the Lord Chancellor himself. And it was an article of faith with Lord Haldane that a special responsibility in this matter rested upon the Lord Chancellor personally. By statute every lunatic is entitled to write to the Lord Chancellor whenever he wishes, and to be supplied with paper and ink for the purpose. Many of them exercise this privilege, some of them every day, and a vast postbag reaches the Lord Chancellor's office every morning.

The Clerk of the Crown has now absorbed the duties of all the other offices hitherto performed by the long string of officials whom I have enumerated, in so far as it is necessary that they should be discharged at all. It is strange that he should have survived when all the others had perished. His office had never given him so large a return as that which accrued to the Clerk of the Hanaper, though he always claimed a position of great importance. The Commission of 1731 summed up his duties as follows :—

'The Clerk of the Crown has constantly to attend the Great Seal for expediting the service of the Crown and the State, without absence, and maintain clerks under him for the King's service, for whom he is to answer. He makes out and writes the Commissions for the King's service, all Patents for the great officers of the Crown, the Judges, the King's Serjeants, and others in England and Wales; All Pardons and Proclamations, Patents of Honour on the creation of any peer, the Writs for summoning peers to Parliament on their creation, as also the same Writs to the Bishops and Judges on their promotion, and His Majesty's Proclamation for calling Parliament; has to receive the returns of sixteen peers elected for North Britain and certify the same to Parliament, and has been usually sent on messages with a Master in Chancery to the lower House . . . is to make out His Majesty's Commissions for giving the Royal Assent to any Bills, as also proroguing or dissolving the Parliaments; is to give the Oath to all persons naturalised when sworn in the upper House; to read the titles of all Bills to His Majesty on the Throne when the Royal Assent is given, and being obliged to attend the Great Seal continually, he claims a seat in the upper House; is to receive and file returns from the Sheriffs of the several members of the House of Commons on their election, and to certify all the said returns to the House; he is, on the first day of Parliament, to attend the Lord Steward in the outer Chamber where he is to give the Oath of Allegiance and Supremacy to the several members before they go into the House; he is on the death of any member,

expulsion, or his accepting any office by order of the House, to make out a new Writ for electing another member; is to alter or amend the return of any member by order of the Speaker; likewise claimeth a seat in the lower House.' The nature of some of his duties may be illustrated by extracts from his accounts. In 1744 he paid 1s. for mending 'ye office bellows'; in 1746 he received £2 13s. 4d. for expediting 'two Writs to ye Sheriffs of London and Middlesex commanding them to behead William, Earl of Kilmarnock'.

The Clerk no longer goes on messages from the Upper to the Lower House, and he no longer gives the Oath of Allegiance and Supremacy to the Commons before they go into their House. But, with these exceptions, the account given in 1731 is a very fair description of the duties which he performs today.

Thus, by about the beginning of the last quarter of the nineteenth century the administrative duties appertaining to the Chancellorship and to the Great Seal were performed in part by the Clerk of the Crown and his officers, and in part by the Lord Chancellor's personal secretariat. The office of the Clerk of the Crown was still a patent office, that is to say the Clerk was appointed by Letters Patent for life by the King on the recommendation of the Prime Minister. He could no longer discharge his duties by deputy, and was accountable to the Exchequer for such fees as were taken in his office. He was personally responsible for observing the proper forms to be used in the drawing of all those instruments which passed under the Great Seal, and was therefore in a sense an independent officer, though, no doubt, he took care to see that he had the approval of the Lord Chancellor in the course of his administration.

On the other hand, the 'Principal Secretary' of the Lord Chancellor was a temporary officer, appointed by the Lord Chancellor when the latter entered upon his office, and going out of office with him. The Secretaries of Presentations and of Commissions, who had been permanent officials in the Court of Chancery, had ceased to exist. But, as the work of looking after magistrates and of the Lord Chancellor's ecclesiastical patronage had to be performed, their place had been taken also by officials whose period of office coincided with that of the Lord Chancellor. No doubt the appointment of magistrates and the presentation to benefices were used for political ends; and it might have been indiscreet for the Lord Chancellor's officers, when they and their master ceased to hold office upon a change of administration, to leave behind them written evidence of the way in which the patronage had been distributed. Therefore, as each Lord Chancellor resigned the Great Seal

his personal officers made a bonfire of all the papers in the office, and the incoming Lord Chancellor and his officers started afresh. The inconvenience of such an arrangement is too obvious to need emphasis. And the successive changes, as each Lord Chancellor faded away, probably leaving his attempts at legal reform unachieved, interposed serious obstacles in the way of ameliorative legislation. Still, a great deal was done in the course of the nineteenth century. The Common Law Procedure Acts almost completely altered the whole system of procedure in the Common Law courts, and substantial progress was made in reform on the Chancery side. It is difficult to understand how Lord Chancellors were able to effect this great task, without any trained permanent assistance. It is still more difficult to understand how Lord Selborne in the seventies was able to prepare and pass the Act of 1873. He could not have done so without the effective help of Lord Cairns, who was to succeed him on the advent to power of the Conservative Government in 1874. And, though there was a sharp political difference between these two Lord Chancellors on one point, on which Lord Cairns won and made his victory effective in the Act of 1875, this task of the establishment of the Supreme Court was accomplished by the co-operation between these two men and the two political parties in which they were eminent leaders. The effect of the two Acts, however, was to enhance the position of the Lord Chancellor and greatly to increase the degree to which he was responsible for the administration of the law. When Lord Selborne returned to office in 1880 he felt even more keenly than he had before the lack of a permanent, trained staff. He states in 1884 that 'I had for some time contemplated' a 'rearrangement of the subordinate offices in the Lord Chancellor's department . . . as necessary for the public service . . . The Lord Chancellor, though Minister of Justice for almost every purpose unconnected with the Criminal Law, had no assistance of the kind given to the other chief Departments of State, either permanent secretaries or under-secretaries. The officers attached to him were personal and liable to change with every change of Government . . . But on each change of Government the lack of continuity was more or less felt; and as the Lord Chancellor's departmental work had a constant tendency to increase, the pressure of that lack increased with it'.

Mr. Kenneth Muir Mackenzie had then, for the previous three years, held the office of Principal Secretary to the Lord Chancellor. Lord Selborne had learned to place great reliance on his acute and subtle mind, diligence and determination. In the eighties of last century the Treasury ruled supreme. Economy was the order of the day. Furthermore the long tradition in accordance with which

the string of legal offices which I have enumerated had been swept out of existence made the idea of the creation of a new permanent legal official abhorrent to the modern mind. We cannot tell how much of the change which ensued is due to Lord Selborne himself and how much to the ingenuity of Mr. Muir Mackenzie. By various expedients, by reducing a salary here, and abolishing a post there, a sum was released sufficient to defray the salary of a Permanent Secretary, and at the same time to pacify the Treasury, and Muir Mackenzie was appointed to the post which he had himself in a sense created, and which he held during the succeeding thirty years to the great advantage of the public service. This, however, could not by itself have completed the work necessary to be done. A fortunate chance presented itself. Mr. R. C. Palmer, a cousin of the Lord Chancellor, had preceded Mackenzie in the place of Principal Secretary, which he had vacated on appointment to the office of Clerk of the Crown in Chancery. At this moment a vacancy occurred among the Masterships in Lunacy. Mr. Palmer was induced to accept appointment to it. Mr. Mackenzie was appointed in his place, and the offices of Principal Secretary and of the Clerk of the Crown in Chancery were united in one person. Thus was established the permanent office of the Lord Chancellor as we now know it.

It will have been observed that Lord Selborne wrote of the Lord Chancellor as being 'Minister of Justice for every purpose unconnected with the Criminal Law'. It must not be supposed from this that the Lord Chancellor claimed to exercise many of the functions which fall within the competence of a Minister of Justice in a continental State. What he meant was that there was concentrated in his hands all the patronage which I have described above, all the duties of supervising the rules which govern procedure in the civil courts, and of collecting and accounting for all the money received in those courts. Every judge, of whatever degree, remains wholly independent in the exercise of his jurisdiction and of his judicial discretion, subject only to whatever rights of appeal may be provided by law. The Lord Chancellor can remove a county court judge from his office but only for inability or misbehaviour in that office. He cannot influence directly or indirectly the decision of any judge, whether of the High Court or of the county court. Thus the severance to which Montesquieu looked remains as an essential feature of our constitution, though the Lord Chancellor in fact performs both legislative and executive functions, and though the Legislature could alter the arrangement whenever it thought fit.

On the other hand, if Lord Selborne's observation was intended to convey the idea that the Lord Chancellor had no connection with

the administration of the criminal law, it is an overstatement. In the first place, as I have already stated, he appoints, and if necessary, removes, all the magistrates throughout England, Scotland and Wales, except those who, as metropolitan magistrates in London and as stipendiary magistrates in the country, are appointed by the Home Secretary, and receive salaries. The vast majority of all criminal proceedings in this country begin and end in courts of summary jurisdiction presided over by lay magistrates. Furthermore, the rules made under the Summary Jurisdiction Acts, which govern the procedure in those courts, are made by the Lord Chancellor, though by a long-standing course of business they are prepared in the Home Office. He has no part nor lot in the execution of the criminal law, and, satisfying Montesquieu's aphorism, the function of the judge is separate from the executive function. But that is not to say that the judge does not in fact perform executive acts. In origin, the justice of the peace is as much an executive as a judicial officer. He issues warrants for the apprehension of alleged offenders and, when he acts as an examining magistrate, it is very difficult to determine how far he is an executive and how far a judicial officer. For many years, in criminal as in civil matters, the tendency has been to devolve by statute duties from the superior to the inferior courts, and as the court of the justice of the peace has acquired more and more purely judicial functions its origin as an executive body has become more and more obscured. Magistrates' courts are often spoken of as 'police courts'. The modern trend is to refrain from using this latter expression. It must be remembered that, before the legislation promoted by Sir Robert Peel created the police force and laid down the lines on which it should be organised, practically the only detective force in London consisted in the 'Bow Street Runners'—'the Redbreasts' with whom readers of eighteenth century fiction, and historical novels dealing with the period, are familiar. They were a body of men organised and directed by the chief magistrate, sitting, as his modern successor still sits, at Bow Street; and Sir John Fielding, the best known of early Bow Street magistrates, comprised in his own person the duties of a kind of judge with those of a kind of superior policeman. The police, generally speaking, are popular in this country; but in England horror of a police state is deep and strong, and rests very largely (though wholly unconsciously) on the idea that a close union between the executive and judicial power must result in tyranny.

THE ABOLITION OF THE DOCTRINE OF COMMON EMPLOYMENT

P. H. Winfield

The defence of common employment has been abolished by the Law Reform (Personal Injuries) Act, 1948 (11 & 12 Geo. 6, c. 41; it came into effect, in general, on June 30, 1948), section 1 of which negatives it as a defence to an employer who is sued by his servant for personal injuries caused by the negligence of a fellow-servant; repeals the Employers' Liability Act, 1880; and makes void any provision in a contract of service or apprenticeship, or in an agreement collateral thereto, which excludes or limits the liability of the employer in respect of personal injuries to the person employed by the negligence of any person in common employment with him. Section 1 does not apply to causes of action accruing before the National Insurance (Industrial Injuries) Act, 1946, came into effect.

Before considering other sections of the Act of 1948, an outline of the history of the doctrine is advisable, for its range was wide and was closely connected with the economic development of the United Kingdom. The doctrine originated in *Priestley* v. *Fowler* (1837) 3 M. & W. 1, where a butcher-boy was injured by the collapse of his master's van in which he was travelling. He sued his master, who was held not liable, because the accident was due to the negligent overloading of the van by (*semble*, though it is not stated in the report) another servant. The judgment of the court was delivered by Lord Abinger C.B. The chief reason for it was the necessity of limiting the liability of a master for the torts committed by his servants, for though the heaviness of the master's liability in the eighteenth century had been lightened in the early nineteenth century by the requirement that the tort must have been committed in the course of the servant's employment, the judicial interpretation of this had not been of much benefit to the master. So the decision in *Priestley* v. *Fowler* may well be regarded as fair, but unfortunately later decisions extended it to any injury received by a servant from any ordinary risk of service, and this provoked the criticism, 'Lord Abinger planted the doctrine of common employment, Baron Alderson watered it and the Devil gave it increase'. In spite of continual agitation by trade unions for its

abolition, there was no statutory modification of it until the Employers' Liability Act, 1880, and the Act by no means extinguished the doctrine; its chief limits of the doctrine were to make the employer liable for any personal injury caused to an employee by any defect in the ways, works, machinery or plant connected with, or used in, the business of the employer, or by the negligence of a fellow-employee whose orders the injured employee was bound to obey and who suffered the injury in obeying such an order. The Workmen's Compensation Act, 1897, though accepting the theory of abolition, gave such unskilful practical effect to it that one part of the workmen were more advantageously placed than any other members of the community, while the other part were less advantageously placed than any other members of the community. Later Acts, culminating in the Workmen's Compensation Act, 1925, made some amendments of the Act of 1897, and the Act of 1925 was replaced by the National Insurance (Industrial Injuries) Act, 1946, which compelled insurance of servants against personal injury arising out of, and in the course of, certain employments specified in the Act, and it required both employer and employee to contribute to the premium of insurance.

It was not only by legislation that qualifications were imposed on the doctrine of common employment, for there is a number of judicial decisions, especially in the present century, that have taken the same line. Thus, in *Wilsons & Clyde Coal Co.* v. *English* [1938] A.C. 57, the House of Lords held that an employer is bound to take reasonable (but not absolute) care for the safety of the servant by providing (i) a competent staff of men; (ii) a proper and safe plant and appliances for the work; and (iii) a proper system of conducting his work and efficient supervision of it. In the very next year after this decision, the range of common employment was still further narrowed by the House of Lords in *Radcliffe* v. *Ribble Motor Services, Ltd.* [1939] A.C. 215, where they rejected a test which might well appeal to a layman and which had had some judicial favour; it was that employment was 'common' if the employees were working 'with a common object': the Lords substituted for this the requirement that the skill and care of one employee must be so important to the other employee that the risk of injury to the latter was the natural and necessary consequence of the failure of the former to exercise such skill and care; and it was held on the facts in *Radcliffe's Case* that this test negatived the defence of common employment where the driver of a vehicle of the defendants was killed by the negligence of the driver of another of their vehicles. This test, as applied in two later decisions of the House

of Lords, was very dependent on the facts of each case, and might not be of much relief to injured employees. In *Graham* (or *Miller*) v. *Glasgow Corporation* [1947] A.C. 368, the House held that it was wrong to construe *Radcliffe's Case* as having decided that servants can never be in common employment if each of them is driving a separate vehicle of the same employers and the negligent driving of one vehicle injures the driver of the other vehicle; the House held that common employment was applicable if the risk of collision between two vehicles driven by servants of the employer was merely an ordinary risk arising from the contiguity of traffic, for then the injured servant has no *special* interest in the skill or caution of his fellow-servant; and in this case there was such special interest because the collision was between tramcars on the same set of rails. But in *Glasgow Corporation* v. *Bruce* [1948] A.C. 79, where one omnibus of the employers collided with another omnibus of theirs, the House of Lords held that the employment was not common because each omnibus was on a different service. The distinction between this case and *Graham's Case* seems rather fine, for it was admitted that a substantial portion of the routes taken by the two omnibuses was common to both of them. As Lord Simon said, 'Every case in this branch of the law depends on its own facts, and fine distinctions are inevitably involved' ([1948] A.C. at p. 85).

On the whole, there seems to have been an increasing judicial tendency to limit the application of common employment. The growing animosity of some of the judges to the doctrine, from which nothing but further Parliamentary legislation could release them, was illustrated by Hilbery J.'s reference to it in *Dorrington* v. *L. P. T. B.* [1947] 2 All E.R. 85, as a 'highly artificial and now unfashionable legal fiction'. In that case, the plaintiff, a female conductor of an omnibus of the defendants, ended her service for the day by giving her surplus 'coppers' to the driver. She remained chatting with the driver, and was injured by the negligent driving of another omnibus of the defendants. The defendants were held liable to her, the defence of common employment being inapplicable because she was no longer doing something incidental to her employment. The case was distinguished from *Coldrick* v. *Partridge Jones & Co., Ltd.* [1910] A.C. 77, because though the employee in that case had finished his work, he was injured while riding in a train provided by his employers and was therefore doing something incidental to his employment.

The National Insurance (Industrial Injuries) Act, 1946 (*ante*, p. 191) certainly went far in assisting the servant, for payment

of the insurance money to him for his injury is not stopped even if he was disobeying his employer's orders at the time that the accident to him occurred, provided (i) it would have been deemed to have arisen out of, and in the course of, his employment if there had been no disobedience, and (ii) the act was done for the purposes of, and in connection with, the employer's trade or business. The Act did not abolish common employment, for certain kinds of employment were excepted from it; thus employees would naturally wish that they ought not to have to contribute to the premiums of insurance required for the employments that are covered by the Act. The amendments of the Act by the National Insurance (Industrial Injuries) Act, 1948, need not be considered here, as they do not affect the main substance of the earlier Act.

The Bill for the Law Reform (Personal Injuries) Act, 1948, which abolished the doctrine of common employment, originated in the House of Lords, and this is all the more impressive because the House includes the Lord Chancellor and the Lords of Appeal in Ordinary; nor was there any political battle over passing the Bill in either House of Parliament. I have already summarised section 1 of the Act (*ante*, p. 191). Section 2 provides that in an action for personal injuries suffered by the employee (including any such action arising out of contract), the assessment of damages must take into account, against any loss of earnings or profits, which has accrued or probably will accrue to the employee from the injuries, one half of the value of any rights which have accrued or probably will accrue to the employee from the injuries, in respect of industrial injury benefit, industrial disablement benefit, or sickness benefit, for the five years beginning with the time when the cause of action accrued. 'Benefit' means 'benefit under the National Insurance Acts, 1946, or any corresponding Act of the Parliament of Northern Ireland'. By section 2 (5), the assessment of damages for the purposes stated above must ignore the possibility of their reduction by contributory negligence, or limitation by any Act or contract. In assessing damages for the death of a person under the Fatal Accidents Act, 1846 (as amended by later legislation), or under the Carriage by Air Act, 1932, there shall not be taken into account any right to benefit resulting from the person's death.

Section 3 provides that 'personal injury' shall include any disease and any impairment of a person's physical or mental condition.

Section 2 (5) (*supra*) applies whether the cause of action accrued, or the action commenced before June 30, 1948, the date at which

general operation of the Act began. The Act binds the Crown; this of course implies reference to the liability imposed upon the Crown by the Crown Proceedings Act, 1947.

Employees may not agree with Macbeth that 'The labour we delight in physics pain', but they would probably do so if 'law' were substituted for 'labour' in the quotation, and the most recent legislation illustrates this amendment of the quotation.

WESTERN POSTCLASSICAL SCHOOLS[1]

EDOARDO VOLTERRA

IT is an established fact that when historical research in Roman Law turned to work on the Justinian compilation with the object of distinguishing in it Classical Law from Byzantine Law, scholars were immediately struck by the profound difference which survives between these two epochs.

In fact, the comparison between private law, such as it still appears in the writings of the late jurists of the Severian period and rescripts of Gordian and Diocletian, and the system of private law applied in the Justinian compilation, shows a profound change, not only in the institutions, but also and above all in the spirit of the system. This system appears influenced by elements and conceptions absolutely unknown to the Classics.

How has it happened? That is the question that scholars put to themselves when the study of the sources permitted, and it made felt the need of a broader survey which would embrace the evolution of Roman Law and which could formulate the manner of this evolution.

At first they had the tendency to attribute all substantial and formal innovations to Justinian's compilers, and consequently, to attribute to the Byzantine Emperor the greatest work of legislation which history records.

It was the time when Bluhme's theory on the formation of the Pandects and on the method followed by the compilers was accepted entirely, and was considered a demonstration of the dominant doctrine.

It was the time when in the work full of life of Hofmann the scholars saw only the most brilliant part, it is true, but also the weakest and the most fanciful, without at the same time perceiving the profound truth conceived by intuition and affirmed with a happy historical sense by this man of genius.

In fact his long demonstration is not acceptable: that is the impossibility that the compilers should have been able in so short a time to accomplish a work so imposing and by the method affirmed by Bluhme. At the same time there is a profound truth in his observation that the renewal of Roman Law, such as it

[1] A lecture delivered in the Law School of the University of Cambridge on May 6, 1948.

appears in comparison with the Classical and Justinian system, could not be the exclusive work of the compilers, but must have been prepared largely in the preceding schools. This truth now appears to modern scholars in all its evident necessity.

This idea has been the germ which has caused a series of researches as much to confirm it, as to deny it. These researches often ended in inexact and hazardous conclusions and also in results sometimes even absurd.

But at the same time they have the great merit to have continued exploring and illuminating certain aspects of this problem which can justly be considered among the most important Romanist problems.

This opinion once accepted, notwithstanding many polemics, the attention of scholars converged on the Byzantine schools of Berytus and Constantinople, which were connected directly with the movement of Justinian's codification.

Others still are of the opinion that these schools must have worked on a classical reaction in the Byzantine world.

The orientation followed in these last years by an eminent Italian Romanist, Salvatore Riccobono, is decidedly against this tendency of legal science. In fact Professor Riccobono argues that the internal spontaneous development of Roman elements is the true source of the new Roman Law. He denies in great part the work and the contribution of the Byzantine schools and affirms that the Byzantine jurists have only faithfully and modestly interpreted the classical sources.

This short exposition shows us that the Romanists studied with the greatest interest the last principal phenomena of Roman Law. And their conclusion is that Justinian's compilation is influenced by the Byzantine schools.

Some Italian Romanists and principally Professors Albertario and Arangio Ruiz carried the hypothesis further, and claimed that a pre-digest was prepared in the Byzantine schools before Justinian.

Little importance is given to the Western postclassical schools, to their doctrines and to the influence they may have exerted. The most important modern treatises on the history of Roman Law speak of them very rarely and in a vague manner, affirming only that the studies in the West very quickly fell into forgetfulness, and preferring to dwell longer on the schools of Berytus and Constantinople.

The Romanists come to identify the pre-Justinian interpolations with Byzantine interpolations and to employ indifferently, and in a general sense, the second adjective to indicate any change, however

substantial or formal, to which one could attribute an origin preceding Justinian.

Could they do this in spite of the changes in the sources, which one finds in the Western collections which go back to before the fifth century, in a time when, according to a generally accepted opinion, the Byzantine schools had not yet reached a true importance in practice and in doctrine?

The Latin works of which fragments are found in the Digest, and that modern critics have recognised to have been composed in a non-classical epoch, are also called Byzantine.

Ernst Levy was the first to oppose this tendency in a communication presented to the Congress of Oslo in 1928. In this communication the illustrious German Jurist shows the great importance of Jurisprudence and of schools in the West for the development of Roman Law in the postclassical epoch. He observes that in a number of cases the Western jurists, guided by a more practical sense, seem to have made changes in the institutions before the Byzantines, and better than they.

In the East, on the contrary, the doctrine had a reaction in the classical sense, and consequently, the Justinians did not reach in their compilation the degree of evolution and development attained by Law in their epoch. For they referred themselves to institutions and principles completely antiquated, sometimes arriving at a willing compromise between the tendency of the doctrine and the transformation which happened in jurisprudence.

From this, one would find their origin in the profound differences between the East and the West for that which concerns the results of the same evolution, divergences which sometimes are apt to be not only of degree but also of principles.

In many cases the East would have had an influence more or less direct on the doctrines, which we find applied and followed out in the West. In these last years Professor Schulz in his excellent work 'Roman Legal Science' has shown the importance of the Western schools.

We cannot examine here all the complex problems and give a detailed history of the Western schools of Jurisprudence and their productions.

I would confine myself then to some short observations written in 1932, which may be considered as an introduction to a more detailed study that I am about to prepare on this problem.

Above all we must remark that the Western sources belonging to the period before Justinian are more interesting and more important than the Eastern sources.

The greater part of the juridical sources before Justinian are

found in the West and in them we can find the surest examples of changes brought about by the postclassical jurists and by the deviations from the ancient system. Thus, for instance, the Collatio, the Consultatio, the Vatican Fragments, the fragments of Autun, the Interpretatio Visigotica, the Epitome of Gaius, the Institutions of Gaius in the manuscript of Verona, and the Leges Barbaricae.

The Eastern sources, however, which have reached us are very few. The only ones we have are the Sinaitic fragments, a fragment of the fifth and of the ninth book of the Responsa of Papinian, the remnant of a Latin text on testaments with Greek scholia, another fragment in a Papyrus of Heidelberg, a treatise on actiones, the famous Syro-Roman Book of which we have many translations in Eastern languages, the new fragments of the Institutions of Gaius with many scholia which probably belong to an epoch later than the fifth century, and a fragment of the fourth book of the Institutions of Gaius in a Papyrus of Oxyrhynchus.

On the contrary, the Western sources at our disposal belong to different periods and form, so to say, nearly an uninterrupted chain from the epoch of Constantine to that of Justinian, so that we can study in them the progress and the evolution of postclassical law and gather often the fact and causes of the evolution. Now, contrary to what may appear to us at first sight on reading such treatises, we find in the literary and juridical sources many data on the Western schools and on their activity.

The information, although scarce and incomplete, is relatively more abundant than that we have about Eastern schools.

The masterly work of Professor Collinet on the school of Berytus reveals immediately that the sources, except those which concern the programme of studies exposed by Justinian in his constitutions, are very few and far from being capable of furnishing us an exact opinion of their history, above all before the fifth century. The records of the school of Rome, and of its importance, go back already to classical law.

The constitution of Caracalla related by Ulpian in which exemption from *munera* is given to those who come to Rome to study law there, shows us that Rome was a centre of culture which attracted students from all parts of the Empire. The future jurists and imperial officials were formed in Rome.

In A.D. 370 a constitution of Valentinian applies to all doctors and professors the exemptions previously given by Constantine and Julian.

In the same year we find the famous constitution of the same

Emperor, which gives eleven rules for students who go to Rome to study the liberal arts. Among them it is necessary above all to note those which concern their manner of living and the magistrates charged to look after them.

Claudius Mamertinus, in his *gratiarum actio* to Julian, speaks about measures taken by this Emperor to resuscitate in all parts of the Empire the liberal arts, among which is included civil law.

Records of young students sent to study law at Rome are frequently found among the writers.

Saint Jerome in an epistle addressed to Rusticus was pleased to know that he had been in Rome to learn there *post studia Galliarum quae vel florentissima sunt.* In the year 400 the Bishop of Auxerre, Saint Germanus, as the Presbyter Constantius writes, '*ut in eum perfectio litterarum plena conflueret, post auditoria Gallicana, intra urbem Romani iuris scientiam plenitudini perfectionis adiecit. Deinde tribunalia praefecturae, professionis advocationis ornavit*'. A Christian epitaph teaches us the existence of a certain Floridus who died in 427, who had been declared barrister, and assessor of the *vicarius urbis* and of the *praeses provinciae* and had taught publicly *Romani foedera iuris.* This confirms the fact that the Jurists were called to the highest positions in the State and also proves that the aims of this school must have been practical and consequently in contact with the social life of those times.

Saint Augustine in his Confessions gives us details of Alipius, who had gone from Africa to Rome so that he could learn law (*ut ius disceret*). The Presbyter Constantius, Rutilius Numatianus, and Symmachus also tell us of young students who came from Gaul to Rome to study law there.

This information concerns above all the Gauls, whose towns were at that time centres of studies.

The imperial constitutions which rule public teaching confirm it. We have also indirect evidence of the existence of many Academies spread nearly everywhere: that of Marseilles recorded by Saint Jerome, that of Autun about which Eumenius speaks, and those of Narbonne and Toulouse named by Ausonius.

It would be very useful to gather together and to examine all these data, not only because they would furnish us with precious information about the preparatory matter in the study of law, but also because, as we can see in several documents, it is precisely in Gaul that great scholastic activity prevailed in the sixth century.

We also have other facts about the state of juridical culture in the West. Sidonius Apollinaris in speaking of Leon, secretary to the king of the Visigoths, tells us that he knew the law of the

Twelve Tables. In other writings he and other writers show us their knowledge of very ancient civil law and classical law.

Justinian even in his constitution which rules the studies of law speaks of Rome and considers it on the same level as Constantinople.

If these fleeting signs permit us to have a glimpse only of the activity of Western schools, on the other hand these signs, as they belong to authors of different periods, attest a perpetual activity in juridical studies in the West.

The juridical Western sources which have reached us, furnish us with a decisive proof of this activity, of its great importance and of its weight.

Modern critics, even if they cannot dedicate themselves to a systematic research, as was done for the Justinian sources, could at the same time find many interpolations, and various modifications to classical rules and principles.

A rapid examination of recent Romanist literature has given me unhoped-for results.

In fact the interpolations and the glosses which have been pointed out in the sources that come from the West, are nearly a thousand. If, in the greater part, there are variations having a formal value only, at the same time we have also numerous variations of substantial importance.

In a paper read at the International Congress of Roman Law in Bologna in 1933 I tried to show, basing my arguments on statistics, the different use of the Sentences of Paul made by the compilers of the Alarician Breviary and Justinian's compilers.

The Sentences gathered together in the Breviary are six hundred and four, and in the Digest there are two hundred and fifty-four. Only fifty among these Sentences are common. But if one compares them, one sees that they are derived from two different compilations.

One compilation was made in the West and the other in the East, and in the greater part the Sentences have been retouched. That shows immediately the great difference which exists between the Oriental and the Western compilers.

We observe that they worked on the same sources almost in the same years and have chosen completely different fragments. In fact very few are the Sentences which are common to both schools. What interests one, does not interest the other, and that shows the different position of the Western and the Eastern jurists.

These facts become still more important if one observes the proportion of common Sentences in other Western compilations whose authors know Paul's Sentences.

The Collatio had eighty, of which twenty-two are common to

those of the Breviary, six to those of the *Codex Vesontinus*, five only to those of the Digest.

The Consultatio contains twenty-four Sentences of which ten are common with the Breviary and one only with the Digest.

The juridical changes which one meets with in Sentences of the Breviary in comparison with classical law are very numerous and they deal with all the fields of law. It is a transformation of conceptions, an evolution, a construction of principles, which show a slow but continual modification accomplished on the classical models.

It is hardly possible to enumerate all these modifications as time does not permit, but all modern scholars know them very well and also know their importance.

We also observe very interesting modifications of classical law in the Collatio, in the Consultatio and in the Interpretatio Visigotica, which is a very important source, but not yet sufficiently studied by the Romanists.

The fragments of Autun are a most important source for research but we can dwell on them only briefly.

The fragments furnish us significant examples on the state of culture and Western teaching.

This paraphrase is modelled on the lessons of a master. He shows the matter very clearly, aiding himself with different examples, and he makes numerous distinctions and quotations of classical institutions also which cannot be applied to his time.

And this is not all. This master, who is accused of being unscholarly and confused, furnishes us with a clear example of scholastic construction, of new conceptions and new institutions, showing also how far removed he is from the author on whom he comments.

It is sufficient to read the paragraph in which he explains the example of universal succession.

We know that modern critics suggest that this institution is exclusively Byzantine and is preferred by Justinian's compilers. But this opinion is not well based. In fact we find the first mention of universal succession in this Western paraphrase. We can oppose to the interpolations found in the fragments of the Digest the teaching of this obscure provincial master of the West.

As Bonfante says, in the phrases of this obscure master we have all the theory of *universitas*. We have all the elements of traditional doctrine, the *hereditas* has become an *universitas*, the *fideicommissum hereditatis* has become a *fideicommissum universitatis*, the conception of *universitas* is always the same also in the partial *fideicommissum*.

Some scholars have argued that the work is influenced by Oriental thought, and that conceptions are also of Eastern origin. About this, they have even recalled the connection between the East and the Gauls, but it is necessary also to remark that the influence has been reciprocal. In all cases their demonstration has not yet been able to detract any value from the absolute fact that in Gaul in the fifth century they taught new juridical principles and made constructions and new conceptions in transforming classical law.

And even if we admitted that the doctrine had an Eastern origin, the fragments would still prove that the Western schools in Western Gaul were ready to welcome every new influence and to elaborate juridical principles and institutions even if completely new.

We can witness this readiness to receive Eastern sources in connection with the Gregorian Code and we find it employed some years after this compilation in the Collatio. We find also the Theodosian Code employed very soon by the compilers both of the Consultatio and of the Vatican Fragments.

What conclusions can we draw from all these data which I am only able to indicate briefly?

This conclusion does not seem to me doubtful: these data show the existence of a juridical tradition in the West, which must have been independent of the East and which through a transformation and a logical evolution develops the principles and the classical institutions on the Roman foundation.

Where could this tradition have found its great development?

The sources show, from the fifth to the sixth century, that there must have been great activity in Gaul and in North Italy.

The examination of the Latin employed by the Visigothic compilers and by the authors of the Consultatio and the Fragments of Autun shows characteristics which establish the difference both in the juridical expressions and the terms between this Latin and the Latin employed in the former sources. In culture as well as in maintaining tenaciously the Roman principles they show in the sixth century a superiority to the schools of Rome.

This is also proved by the comparison between them and the Edict of Theodoric which, according to tradition, was composed in the Roman school.

The Roman culture during the invasions after the fall of the Western Empire must have taken refuge in Gaul and it also continues to flourish and to develop itself, providing new currents of thought for what concerns the history of civilisation.

This conclusion can be demonstrated, as much by a great

number of Gallic inscriptions which record the masters of law and rhetoricians as by the records quoted in the treasure of Roman civilisation saved by the Gallican church.

At the same time as in the East, provincial schools in the West must have reached a superiority, and must have exercised a much greater influence on doctrine than the schools of the Capitals.

The fact that in the Sources, even if they belong to a late epoch, one does not find Germanic influences, shows that it acts truly from a doctrinal movement on a Roman basis.

It is possible to demonstrate easily that such influences, alleged by the Germanists especially in the field of penal law, disappear on an attentive investigation.

It is a new proof of the vitality and truly Roman character which survives even under foreign dominations, ruled by opposite juridical principles. It is a new proof of the difference which exists between the Western schools and the Oriental schools, where foreign influence is evident.

I think it necessary to consider some problems which naturally come to one's mind. The first concerns above all the connections between Eastern and Western schools and their probable reciprocal influence.

The question is not such that one can solve it immediately. In the present state of our knowledge we can consider it only in the briefest outline.

As it seems to me, the connections ought to have been close in the first moment, becoming rarer after the year A.D. 395.

In this epoch in fact in the Orient the Greek language decidedly triumphs over Latin, and the teaching is done in a spirit completely different from the classical spirit.

In the preceding period we have records of masters and Oriental students who went to Rome to teach and to be taught: afterwards we have no knowledge of this movement, and we do not find among the students of Berytus any Western name.

The similarity between Western and Oriental schools must have been interrupted, and each of the schools must have had its own independent development.

That does not prevent the two developments from reaching the same results. That seems to be natural, if one thinks that they had a common point of departure and that their principal basis was classical law.

However, as Professor Levy has brought to light, these results were very often attained in different times with a different rhythm, and we can also add in the following different ways.

The language employed seems different: in the East in fact

they employed Greek and Latin deformed by numerous Greek and Byzantine elements. In the West they employed only Latin penetrated with barbarous and vulgar elements.

The spirit and the methods are also different: the Byzantines, dominated by the speculative and dogmatic mentality characteristic of the philosophy and theology of the time, were obliged to construct general rules, to classify, and to introduce in the juridical field conceptions and deviations proper to Greek philosophy.

They worked in a society completely different from Roman society, a society which no longer felt classical tradition, and in which completely Eastern ideas were still in evidence.

They have as a basis in the East a law which is largely influenced by Oriental law.

In the West things proceeded in a completely different manner. Here, as we have already remarked, the spirit and the practical tendency dominate. Classical traditions are more alive.

Roman Law continues to be applied in the same region and among the same populations where it was born.

It is true that even here society is deeply changed, and is dominated by new ideas and new principles. It is true, too, that the political régime and social spirit have been transformed.

This does not alter the fact that the basis is always Roman, and that the law in the West did not apply itself as in the East to a strange people.

The works composed about classical law also appear different. The Byzantines after the fifth century have a predilection for the scholia and for the gloss separated from the text.

They composed indices, and translations, where often they have the tendency to change the text, and not infrequently they composed paraphrases and monographs on some particular institutions.

In the West jurists have a tendency to draw from the immense and disorderly mass of juridical writings and imperial constitutions works of a practical character.

In fact the works which dominate in this period are either compilations of *iura* and *leges* ordered under titles according to the matter with a view to render research easier, or anthologies of classical juridical writings, or epitomes, that is to say résumés of greater works, made in order to expound the matter in a more concise manner, to take away the superfluous, to make knowledge more accessible.

It is very important to solve another problem. Did the Western movement have an influence on Justinian's compilation?

Everyone can see that this problem is closely linked with the

preceding. It cannot be solved if one has not first explained the other.

I will observe only that many of the examples of glosses and interpolations introduced in the Western sources are found without even verbal variations in the Digest and in the Code.

How can we explain this? Is it perhaps a case of ancient changes introduced in the juridical texts, or in the imperial constitutions, prior to the compilation of Occidental postclassical works, or rather in a period in which the connection between East and West was a close one?

I do not believe that it is possible to give here a satisfactory explanation, but I put forward a modest hypothesis, that the compilers of Justinian in compiling the Digest also made use of the Western texts.

Only in this manner could one explain the use of works which, like Paul's Sentences, would appear to have been compiled in the West; and which do not appear to have been employed formerly by Oriental schools.

Some hypotheses have already been advanced. One, the existence of a pre-digest, has been sustained by several schools. Another, that of the existence of glosses and pre-Justinian retouching in the sources employed by the compilers, has now come to the fore.

But is it possible that all these pre-Justinian modifications of the Digest could be Oriental? Is it not strange to find pre-Justinian Latin interpolations in the Digest, whilst all the Oriental sources preserved to us, including the new Gaius, have Greek glosses? Evidently even in the Eastern schools they knew Latin, but they thought and wrote in Greek. They also taught in Greek as Professor Collinet has clearly shown.

We might suppose, that among the ancient books employed by the compilers of the Digest, some may have been of Western origin and have been used in the Western schools.

The constitutions of the fifth century speak to us of exchange of books and librarians between the West and the East. The information on the constitutions furnished to us by the great quantity of books gathered together by Tribonian might be interesting for our problem.

It is certain that the work of Justinian is more Western than Eastern, which is shown by the fact that it was understood, studied, and applied later in the West, while it could not have been applied practically in the East.

Another consideration may lend a greater value to this hypothesis and may also serve as a criterion for the critic of the Corpus Iuris.

According to me, it is possible to distinguish, in the classical texts gathered together by the compilers, the glosses and the postclassical interpolations coming from the Western schools. We can prove that by means of a simple philological examination.

Some in fact are written in a Latin in which Greek Byzantine forms dominate; others in a Latin full of expressions, words and forms proper to the language employed by the jurists in the West of the first century.

However, the principles and the rules which one meets in the postclassical Western sources and which occur again in the interpolations of Justinian are so numerous that the hypothesis of Western influence becomes self-evident.

Leaving that on one side, the study of the Eastern movement shows us one aspect of the development of Roman Law beyond that of the work of Justinian, and reveals to us all its importance. But on that account it will be very important to examine the Imperial constitutions in order to distinguish those of Oriental origin from those of Western origin.

This examination can furnish us with important ideas and permit us to study the evolution of Roman Law in the last period without confusing the two movements, but showing those which are developed independently and which afterwards united together in the compilation of Justinian.

A HISTORY OF ENGLISH CRIMINAL LAW AND ITS ADMINISTRATION [1]

Arnold D. McNair

This is a book of unusual merit and interest. The author, Dr. Radzinowicz, a Fellow of Trinity College, Cambridge, is the Assistant Director of Research in Criminal Science in the Cambridge Faculty of Law. It is the first of a series of volumes in which he proposes to set forth the history of our criminal law and its administration from 1750 onwards, and an examination of his sources and his methods indicates that he has set himself a task whose magnitude and complexity would daunt most scholars. As Lord Macmillan, in the Foreword which he contributes as Chairman of the Pilgrim Trust, points out, the author's conception of what is meant by raw materials is staggering. The examination of decided cases and textbooks alone would be formidable, but Dr. Radzinowicz has already had to consult some 1,250 reports of Commissions and Committees of Inquiry, 800 annual reports and 1,100 volumes of Parliamentary Debates.

This volume covers approximately the period between 1750 and the Reform Bill, though, of course, innumerable Statutes and decisions dating from the Middle Ages are cited and discussed. Its main theme is the slow infiltration of reason and humanity into a field of State activity dominated by unreason and brutal savagery. As would be expected, a very large part of it deals with the slow breakdown of a stubborn and undiscriminating belief in the efficacy of capital punishment, and the reader continually realises how true it is that the suffering of mankind is due not merely to the acts of the wicked but to the thoughtless inaction and social blindness of the good.

The first eight chapters (Parts I and II and a portion of Part III) are primarily concerned with capital punishment. The common law confined this penalty to a very few grave crimes, and even the activity of the Tudor and Stuart Parliaments brought the number of capital crimes up to no more than about fifty in 1688. Between 1727 and 1810 Parliament panicked and created new capital offences at the rate of about one each year. The year 1722 had

[1] *A History of English Criminal Law and its Administration from 1750. Vol. 1. The Movement for Reform.* By Leon Radzinowicz, M.A.(Cantab), LL.D.(Cracow), LL.D.(Rome). London: Stevens & Sons. 1948. xxiv and 853 pp. £3 10s.

already set up a record; one of the worst instances of panic legislation is the Statute of that year which was known as the Waltham Black Act. According to Blackstone it was enacted to stop the depredations, near Waltham in Hampshire, of a gang of outlaws who operated in the forests of that neighbourhood; they seem to have regarded themselves as the descendants of one of the heroes of our boyhood, Robert, or Robin, Hood, and included in their technique the blacking of their faces and other picturesque disguises. So comprehensive was this Act that it was almost a criminal code in itself, and so great was its severity that the number of cases in which the penalty of death could possibly be ordered in pursuance of its provisions was about 350! Originally enacted for three years only, it became in 1758 a permanent feature of the criminal landscape, and was repealed only after a century and at the cost of a long and hard campaign.

One of the most interesting, and quite the most gruesome, portions of the book is Part II, consisting of 140 pages, and dealing with Statutes providing for the death sentence, their application and interpretation by the courts, the commutation of sentences under the prerogative of mercy, and the manner and circumstances of the execution of these sentences. From a sociological point of view this part (and particularly the ample footnotes) is of unusual interest. Several comments may be made upon it. (i) The Statutes inflicted the death penalty in so undiscriminating a manner and for a range of offences differing so widely in moral culpability that they encouraged a continual conspiracy amongst judges, counsel and juries to undermine their effect by avoiding verdicts which would entail death. That in itself was bad, because it involved palpably artificial constructions of the law and, in the case of larceny, ludicrous undervaluations of the property stolen, and thus brought the law into contempt. It was in fact a humane conspiracy on the part of the administrators of the law against the legislators, but it was only within narrow limits that the savagery of our criminal law could be mitigated in this way.

(ii) The same Part throws a lurid light both upon the complacency and lack of imagination of the educated classes and upon the brutal instincts of the mob. The public execution of criminals was justified by insistence upon the deterrent aspect of punishment. Even Dr. Johnson, a humane man, protested against the proposal to abolish the degrading procession to Tyburn. 'The age' (he said in 1783) 'is running after innovation . . . ; men are to be hanged in a new way; Tyburn itself is not safe from the fury of innovation'. Yet these public processions and executions afforded the occasion of witnessing human nature in the attendant mob at

its lowest depths, and most readers of the necessary, copious and revolting details supplied by the author of this book will be convinced that the net moral effect of public executions was heavily on the debit side.

(iii) Depressing as the reading of this Part must be, it contains definite evidence, much needed in our generation, that the public morals of our country have undergone a profound improvement in the course of the past two centuries. However serious the present wave of crime and the present state of moral behaviour may be, nothing will persuade me that today there could be enacted in England the terrible scenes described in this Part of the book.

Part III takes us across the Channel. After a chapter on the 'Doctrine of Maximum Severity', in which the Rev. Martin Madan and Archdeacon Paley cut lamentable figures not usually associated with their cloth, and in which reference is made to some earlier writers including Thomas More, Jeremy Taylor, George Fox and Henry Spelman, the author turns to examine the rise of liberal thought on the Continent of Europe. The opinions of Montesquieu and Beccaria are fully described, and the stimulus given by them to the movement of reform is illustrated by reference to a number of new European codes. Then follow a hundred pages on the awakening of domestic opinion in England by the English reformers—primarily William Eden, the first Lord Auckland, John Howard, Samuel Romilly and Jeremy Bentham. These pages are in my opinion the core of the book. In them is described that preparation of the public mind, that stirring of the public conscience, which eventually took effect in Parliament and launched on its course the movement towards the reform of criminal justice which is still in full swing and must ever remain the daily preoccupation of any civilised community. While Eden and Romilly deserve the credit of being the first to evolve and advocate definite programmes of reform, there were other thoughtful men, who by their criticisms of the existing system, if system it can be called, played their part in loosening its foundations. Of these the author mentions amongst others Dr. Johnson, who in the *Rambler* in 1751, twenty years before the publication of Eden's *Principles of Penal Law*, made a powerful plea for reform; Burke, Fox and Pitt, Wilberforce and Blackstone.

In Parts IV and V the movement passes from the study and the press into Parliament, and the story of successive Committees of Inquiry, often completely abortive for many years, and of successive Bills killed by unreasoning opposition, is told. The final section, entitled 'Sir Robert Peel and Beyond', of Part V shows us the

movement fully established as an abiding concern of British government.

Lovers of Dr. Johnson have long been somewhat mystified by the curious episode of the Rev. Dr. William Dodd, LL.D. of Cambridge—'Dodd, William, forger', as the D.N.B. calls him—executed for forgery in 1777. The author has written a chapter of twenty-two pages upon this case and has elevated it from the realm of literary curiosity into that of events of significant social importance. The sacred character of the criminal's profession, and the spectacular nature of his career, focused public attention upon the extreme penalty which he paid and made many begin to wonder whether it was right that the same penalty—death—should be meted out promiscuously, to so polite a crime as forgery, however serious from a commercial point of view, and to crimes inspired by the utmost savagery. This chapter is an admirable illustration of the systematic and unrelenting pursuit of facts and contemporary opinions which is an outstanding feature of Dr. Radzinowicz's technique.

Reference has already been made to the official sources from which he has drawn his materials. His use of these sources alone would have ensured a reliable and well-documented book; but it need not have been an interesting book. What makes this book so easy to read and so full of human interest, in my judgment, is the intimate knowledge of the personal life of the period which the author has acquired from an exhaustive study of memoirs, diaries, newspapers and ephemeral literature of that character. He has told us not only what was happening but what all sorts and conditions of men thought and said about what was happening under their eyes. For a student of morbid psychology here is much food for reflection.

One general warning I must give to the reader. In order not to overburden his narrative the author has made the fullest use of footnotes. From the point of view of the social interest of the book the busy reader who wishes to get its full flavour must not be tempted into thinking that he can ignore the footnotes, for they are richly packed with important material.

By means of 120 pages of appendices the author has wisely lightened his text, while preserving much important matter. I would commend to the reader in particular an appendix entitled 'Views of Foreign Observers on the State of Crime and the System of Criminal Justice in England mainly in the Eighteenth Century'. He will find there what foreign visitors to our shores thought of us —both good and bad.

Finally, we must recognise the discriminating generosity which

induced the Pilgrim Trust to give 'aid or comfort' in the preparation of this volume; and, not least, we must congratulate the author and his wife, who came to England only ten years ago, both upon an important and scholarly contribution to English history and upon a remarkable linguistic achievement. It is hard to find, in their choice of words and their phrasing, any evidence that the author and his constant and devoted assistant, Mrs. Radzinowicz, did not receive in their youth (or shall I say their earlier youth?) a conventional English education on a high level.

Perhaps I may be forgiven, in writing in *The Cambridge Law Journal*, when I make one further deduction from the reading of this book, namely, the wisdom and foresight of the Cambridge Faculty of Law in establishing, some eight years ago, their Department of Criminal Science and in securing Dr. Radzinowicz as the inspirer and director of its research.

THE THREE QUOTATIONS FROM HOMER IN DIGEST 18.1.1.1

David Daube

In the opening fragment of *Digest* 18.1, Paul tells us that Sabinus and Cassius had not required a money price in sale. So long as you could distinguish buyer and seller, they had contended, the mere fact that the buyer paid with goods made no difference, but such a *permutatio* was sale. Sabinus had appealed to the authority of Homer, who says[1]: 'From there (*i.e.*, from the ships sent by Euneus from Lemnos) the long-haired Achaeans procured wine, some for bronze, some for gleaming iron, some for hides, some for whole cattle and some for slaves'.

As these verses do not contain the term 'sale' at all, they are generally regarded as pointless; and it is held that all Sabinus can have meant to prove by them was that other things than money might be used for trading—a platitude for which he need not have searched the ancient books.[2] This, however, is doing him an injustice. As a matter of fact, he knew very well why he adduced just this passage. The word χαλκῷ, here rendered as 'for bronze', was rendered as 'aere' by the Romans. Paul, in the very fragment under discussion, says that the Greeks obtained wine 'aere ferro hominibusque'.[3] One of the meanings of 'aes', as indeed of χαλκός, was 'money'. (One may think, for example, of 'aes alienum'.) It was, therefore, possible to ascribe to χαλκῷ in the passage quoted the sense of 'for money', instead of 'for bronze'. Sabinus translated: 'They procured wine, some for money, some for gleaming iron,' etc. His point was that acquisition for money and acquisition for goods were here put on the same level. Homer treated them as a single institution, at least where, as in this case, it was clear which was the thing sold (the wine offered by Euneus) and which that given as price. That was exactly what he wished to do in Roman law.

[1] *Iliad* 7.472 ff.

[2] See C. F. von Glück, *Pandecten*, Pt. 16, 2nd ed., 1868, pp. 4 f. The view was shared by Professor Buckland in his lectures.

[3] The same rendering may be found in the stereotype edition of the *Corpus Juris Civilis* by T. Mommsen and P. Krueger, vol. 1, 1928, p. 263 n. 2. See also *Cyrilli, Philoxeni aliorumque veterum auctorum Glossaria*, ed. by Carolus Labbaeus (1679), 1816–26, pp. 181 f., 194; and for various other examples of the identification, *Thesaurus Linguae Latinae*, vol. 1, 1900, cols. 1071 ff.

This explanation of his argument is confirmed by Paul's criticism of it. He points out, rightly, that the verses in question speak exclusively of plain barter. In other words, though the word χαλκῷ, 'aere', is employed, in this context it denotes, not 'for money', but 'for bronze'. In support, Paul refers to another passage from the *Iliad*[4]: 'Then Zeus deprived Glaucus of his wits, and he made exchange of armour with Diomedes, son of Tydeus'.

Now as these two verses stand in the *Digest*, they are utterly irrelevant, speaking neither for Paul nor for Sabinus. But when we look up the original, it is immediately clear that we must add the first two words of the next verse, χρύσεα χαλκείων, when the quotation becomes intelligible. The mad thing Glaucus did was to let go his precious suit of armour for Diomedes' plain one, 'giving golden for bronze'. These verses, Paul maintains, show that χαλκός and its derivatives, when used by Homer in connection with such transactions, refer not to money but to objects of bronze. The case of Diomedes and Glaucus, where χαλκείων occurs, is manifestly one of *permutatio*; consequently, Paul reasons, that of the Greeks getting wine, where χαλκῷ occurs, must be the same. They procured wine 'for bronze', not 'for money'. Sabinus is refuted, his text does not equate acquisition for money and acquisition for goods, since the latter kind of transaction alone is contemplated.

When did the two words drop out, the absence of which renders the second quotation meaningless? Hardly before Paul or through him, for everything in this fragment suggests that, though he may be copying an earlier source, he fully understands what it is about. Possibly through carelessness of the compilers, and possibly even later. There is nothing surprising in a slip of this sort. It was very usual, when citing a text from a well-known author, to put only the opening words,[5] in this case perhaps: 'Then Zeus deprived Glaucus'. A scribe writing out the whole might easily stop a little too early, so that 'giving golden for bronze' would no longer appear.

Paul goes on to remark that there is an expression in Homer on which Sabinus might have based himself with far more justification[6]: 'He bought with his wealth'.

The phrase occurs several times, and once at least it is quite clear that the 'wealth' given as price consists in goods, not money, namely, where we are told of Eurycleia[7] that 'Laertes had bought

[4] 6.234 f.

[5] In *Gaius* 3.141, the Veronese text as usual omits the Greek quotation, *Iliad* 7.472 ff. (extant in Justinian's *Institutes* 3.23.2). But even in the MS. which the scribe had before him, only the beginning seems to have been given, since he still puts 'et reliqua'. See F. Kniep, *Gai Institutionum Commentarius Tertius*, §§ 88–225, 1917, p. 27 n. 9 and p. 28 n. 1.

[6] *Odyssey* 1.430, 14.115, 452.

[7] 1.430 f.

her with his wealth long before, when she was in her first youth, and had given for her twenty oxen'. Homer, then, here speaks of 'buying', even though the price is not in money. A better text for Sabinus, Paul thinks, than that which he had chosen.

Nevertheless, Paul declares a money price essential. Homer is no more of a source of law for him than Shakespeare is for us. Nor, in all probability, had Sabinus's attitude been very different in this respect. To bring in a reference to one of the great authors of the olden times was an elegant thing to do—that was the main consideration. Still, writers like Cicero and Quintilian do state [8] that a certain persuasive force attaches to the opinions of illustrious poets.

The way in which some of these passages are torn from their contexts, or in which one passage is interpreted by reference to another which has nothing to do with it, is highly reminiscent of the treatment of Old Testament material in the New Testament and Talmud. It is not proposed here to go into this problem, beyond remarking that, in this as in other matters, the similarity is probably due to the influence of the rhetorical schools, which was much the same throughout the civilised Mediterranean world.[9]

[8] *Topica* 20.78, *Institutio Oratoria* 5.11.36 f.
[9] See the writer's discussion of F. Schulz's *Roman Legal Science*, in *Journal of Roman Studies*, vol. 38, 1948, pp. 115 ff.

'QUASI-JUDICIAL' AND ITS BACKGROUND

H. W. R. Wade

The epithet 'quasi-judicial' has become familiar, if not popular, in administrative law. It is commonly used to describe certain kinds of powers wielded by ministers or government departments but subject to a degree of judicial control in the manner of their exercise. Generally speaking, it is applied to powers which can be exercised only when certain facts have been found to exist, and it indicates that these facts must be found in conformity with a code of rules called 'natural justice'.[1] As a term 'quasi-judicial' has for some years been falling into disfavour. 'I do not like it', observed a learned judge to whom it had been a source of recurrent difficulty in the well-known series of cases under the Housing Acts.[2] More recently the Master of the Rolls has spoken of 'what is loosely called a quasi-judicial proceeding—an expression well adapted to mislead unless the context in which it is used is kept closely and accurately in mind'.[3] Academic authorities have treated the term with even greater distaste. Sir Ivor Jennings appears to regard it as one of a number of pseudo-analytical expressions derived from false premises as to the separation of powers. All these expressions

[1] *Cooper* v. *Wandsworth Board of Works* (1863) 14 C.B. (N.S.) 180 (Keir and Lawson, *Cases on Constitutional Law*, 194) is a good example. In most of the modern cases there has been a special procedure prescribed by statute. The most familiar example is found in the 'slum clearance' provisions of the Housing Act, 1936 (substantially similar to those in the Act of 1930). By ss. 25–6, where the local authority is satisfied that an area of buildings ought to be demolished, they are required to make, publish and submit to the Minister of Health a 'clearance order' (unless they elect to proceed by purchasing the land and clearing it themselves). By the Third Schedule the Minister 'may, if he thinks fit, confirm the order', but before doing so he must, if any objection has been made 'cause a public local inquiry to be held' and 'consider any objection not withdrawn and the report of the person who held the inquiry'. Corresponding provisions apply to compulsory purchases (First Schedule). This type of enactment is now very common, *e.g.*, Restriction of Ribbon Development Act, 1935, ss. 1, 7; Trunk Roads Acts, 1936, s. 10, 1946, 2nd Schedule; New Towns Act, 1946, 1st Schedule; Civil Aviation Act, 1946, 3rd Schedule; Acquisition of Land (Authorisation Procedure) Act, 1946, 1st Schedule; National Health Service Act, 1946, 2nd Schedule; Agriculture Act, 1947, ss. 12, 14, 16, 17, 84, 2nd and 5th Schedules; Transport Act, 1947, 8th Schedule; Town and Country Planning Act, 1947, ss. 10, 16, 19, 26, 49, 6th and 11th Schedules; River Boards Act, 1948, 1st Schedule; Agricultural Holdings Act, 1948, ss. 27, 28, 50, 68, 75.

[2] Swift J. [1936] L.J.K.B. at p. 129.

[3] Lord Greene M.R. [1947] K.B. at p. 715; cf. his similar remarks [1947] 2 All E.R. at p. 400.

he regards as misleading and unhelpful for practical purposes.[4] Professor Robson, a member of the same school of thought, pours elaborate scorn both on ' quasi-judicial ' and on what he calls ' the cult of the quasi '.[5] In the U.S.A., where the expression has also established itself, it has been attacked as ' a confession of vagueness, an announcement that precise definition is impossible '.[6]

Now no one contends that ' quasi-judicial ' is an elegant term of art. But there is some danger that its critics may condemn along with it the valuable judicial process which has sheltered under its name, and that its fall from favour may affect, on a broader plane, the whole practice of analysing and distinguishing constitutional functions which brought the term to birth. Its detractors have not always recognised how valuable and remarkable a part it has played in the development of our machinery of judicial control. Accordingly, it has suffered at times from misapplication and lack of analysis. It might perhaps have been expected that in the courts, as case succeeded case, the term might appear now in one context and now in another, while students of administrative law would try to define it more rigorously. But the opposite has happened. Up to quite recent times it has been consistently developed by the courts, while its principal academic critics have denounced it as absurd. This is no mere matter of words : it is a matter of functions, functions which lie on the borderland between the judicial and executive spheres and whose correct understanding are of practical interest and significance. For example, it is now often suggested that the time is coming, or may have come, when that ' sprawling mass ',[7] that ' most disorderly array of tribunals of all kinds ' [8] should in some way be rationalised or at least be subjected to some more or less uniform code of procedure. ' Above all else, Parliament should attempt to resolve the lack of system in the mass of administrative tribunals.' [9] There is ' a question which is of ever-growing importance : Is it possible to establish certain basic rules of procedure which will be applicable to all administrative hearings and appeals ?' [9] The American Legislature has already tackled this question in the Administrative Procedure Act of 1946.[10]

[4] Jennings, *The Law and the Constitution* (3rd ed.), Appendix I (referred to in subsequent footnotes as ' Jennings ').

[5] Robson, *Justice and Administrative Law*, 2nd ed., pp. 401–3 (referred to in subsequent footnotes as ' Robson '. See also Mr. de Smith in 1948 Mod.L.R. at pp. 307–10 for similar views. Mr. D. M. Gordon, K.C., has described the expression ' quasi-judicial ' as ' not only vague, but misleading too ' : 49 L.Q.R. at p. 95.

[6] Cushman, *The Independent Regulatory Commissions*, 8 (quoted in 64 L.Q.R. at p. 525).

[7] Allen, *Bureaucracy Triumphant*, 88.

[8] Robson, 509.

[9] Professor A. L. Goodhart, K.C., in a letter to *The Times*, March 3, 1947.

[10] Described by Dr. Bernard Schwartz in 63 L.Q.R. 43.

In this country the problems are in many ways similar, though perhaps even more formidable. Executive powers in England are more extensive and heterogeneous than in America, and so, therefore, are administrative tribunals. If the task of systematising them is ever faced the first step will inevitably have to be a study of powers and functions, analysed, labelled and defined. 'The most scientific explorer cannot make a map of a jungle.' This was the comment of the Committee on Ministers' Powers, in whose report [11] is to be found the best known and most comprehensive analysis which has so far been attempted. It has been of great assistance, though at times rather hardly used. But, despite honourable mention in several reported cases [12] by one of its draftsmen, Lord Justice Scott, it has not obtained judicial recognition generally. It is now only too easy to illustrate the Master of the Rolls' reference to the 'loosely called' quasi-judicial function. Not long ago Mr. Bernard Shaw appealed for a select committee on political terminology. With a similar motive I will try to examine the confusion of language abounding in our administrative law. First among the needs of this subject is a dictionary, a set of settled terms which shall be accepted and understood. This is no less desirable, and a good deal more attainable, than in politics.

THE GENERAL ANALYSIS OF POWERS

Before we can plot the position of the quasi-judicial function we must, at the expense of some space, test its points of reference : the three traditionally distinct powers, legislative, administrative and judicial. Most English lawyers are brought up to believe that these powers are separable, although not always separated, in our constitution.[13] 'In practice, it is inevitable that they should overlap. In such constitutions as those of France and the United States of America attempts to keep them rigidly apart have been made, but have proved unsuccessful. The distinction is none the less real, and for our purposes important.' [14] This is the classic view. But writers who have examined it critically in recent years have rejected it, though with varying results. The criticisms which must be briefly considered are those of Sir Ivor Jennings and Professor Robson (who are substantially in agreement) and Mr. D. M. Gordon. All assert that there are in reality not three sorts of powers but (at the most) two. But thereafter they differ. The

[11] [1932] Cmd. 4060 (referred to in subsequent footnotes as M.P.R.).
[12] *Cooper* v. *Wilson* [1937] 2 K.B. 309 at p. 340; *Blackpool Corporation* v. *Locker* [1948] 1 K.B. 349 at p. 367.
[13] See, for example, Wade and Phillips, *Constitutional Law*, Pt. II, Chap. 1; and references given in Robson, pp. 13–19.
[14] M.P.R. 4.

Jennings-Robson position is that, wherever the legislative function may stand, the judicial is fundamentally indistinguishable from the administrative.[15] Mr. Gordon, following a more traditional path, upholds and explains the judicial function as unique, but his reasoning drives him to the conclusion that there is no definable borderline between the administrative and legislative.[16] What then are we to think? We can perhaps appreciate the conflicting opinions most fairly in the light of the different objectives of their authors.

Sir Ivor Jennings and Professor Robson are both concerned with the important problem of allocation of functions which confronts—or ought to confront—the draftsmen of statutes conferring new powers on ministers or other executive authorities. In any given case there may be certain arguments for entrusting a certain power of decision to the courts or to a minister, a government department or a special tribunal.[17] Admittedly the courts have certain administrative powers and the administration has certain judicial powers.[18] Therefore, even if judicial and administrative powers were inherently distinguishable, the distinction would not be the test for the allocation of new powers. But then it is denied that these powers *are* distinct in any fundamental way. Administration of justice is merely a specialised branch of administration generally, and both alike involve the application of *power*, the imposition of legal rights and duties on individuals. In both cases alike the powers are—as every power must be—to a greater or less degree discretionary. The judicial process has of course a highly specialised character, a traditional independence from political influence, and a historical and institutional background which are all its own. But then, one might argue, the Home Office and the Admiralty have developed quite different organisations for dealing with their different tasks, yet constitutional lawyers do not for this reason lay down fundamental distinctions as to the nature of their

[15] Jennings, 283; Robson, 12, 374–5. Their opinions are reflected in Dr. R. M. Jackson's *The Machinery of Justice in England*, 282–7.

[16] 'Administrative Tribunals and the Courts', 49 L.Q.R. 94, 419. In these articles (to which, as will be seen, I am much indebted), Mr. Gordon considers numerous cases in which distinctions between judicial and administrative powers have been material, and he exposes the weaknesses of several judicial attempts at analysis. It is of interest now to note that the Crown Proceedings Act, 1947, s. 2 (5), assumes that 'judicial' functions are definable; the Crown is exempted from liability in tort for anything done in discharge or purported discharge of 'responsibilities of a judicial nature' or in the execution of 'judicial process'. It may well be that this provision will give trouble to the courts. Will the Crown, for example, be liable if a Ministry of Health inspector conducting a public inquiry into a slum clearance scheme maliciously slanders one of the parties?

[17] For some suggested principles see M.P.R., 116; Jennings, 281; Robson, 500.

[18] For examples see Robson, 19, 23.

powers : all are alike administrative. Professor Robson has a particularly attractive motive for exposing the non-existence of the legendary cordon behind which the judicial power is isolated. If the work of judges is regarded as a branch of administration, it follows that there is no inherent reason why the best features of the judicial technique should not be extended to other administrative activities which have features in common with the business of the courts. ' We can then inquire whether, with the rise of administrative law in England, there has been a spreading of the judicial outlook to those administrative tribunals of which we have already spoken. This, after all, is the vital question.' [19] A High Court judge, a Special Commissioner of Income Tax, a District Auditor, a member of a Court of Referees, an inspector conducting a town planning inquiry, a Minister about to make a compulsory purchase order—are all alike concerned with the judicial side of administration. They vary in their ties with Whitehall as indeed in many other particulars. But all are to a greater or less degree concerned with the dispensation of justice and, subject only to practical necessities, there are common principles which ought to apply to them all. For example, all ought to cultivate ' the judicial mind ', all ought to be prepared to hear parties orally, and all ought to give reasons for their decisions. If the difference between the High Court and an Administrative Tribunal is merely one of institutional history and practical advantage, and in no way derived from any fundamental separation of powers, then Whitehall has no general excuse for failing to adopt and conform to the best precepts and practices of our highly developed judicial procedure. It is a good service, therefore, to administrative law to break down the barricade which Montesquieu and his followers have erected between the courts and the executive. Sir Ivor Jennings, who is concerned rather with the allocation of powers than with the manner of their administration and with the logical difficulties of distinguishing the discretionary powers of the courts from the discretionary powers of officials, concludes :

> ' It is indeed clear not only that no distinction can be drawn between functions by reason of their substance or quality, but even that it is not easy to make a formal distinction in respect of procedure. The doctrine of the separation of powers gives no assistance in the allocation of functions.' [20]

I cannot, in so few words, do justice to the views of this distinguished school. But they are important, and they must be noticed as a body of authoritative opinion which rejects our inherited

[19] Robson, 34.
[20] Jennings, 283.

theory—which can be traced back to Aristotle [21]—that the judicial power in the State is fundamentally different from the executive.

Mr. Gordon's analysis is more orthodox, more idealistic and more rigorous, though in some ways just as novel in its results. In the traditional manner he isolates and dissects the judicial function, and lays bare the line which essentially separates the judge from the administrator.

'A tribunal that dispenses justice, *i.e.*, every judicial tribunal, is concerned with legal rights and liabilities which means rights and liabilities conferred or imposed by law; and "law" means statute or long settled principles. These legal rights and liabilities are treated by a judicial tribunal as pre-existing; such a tribunal professes merely to ascertain and give effect to them; . . . In contrast, non-judicial tribunals of the type called "administrative" have invariably based their decisions and orders, not on legal rights and liabilities, but on policy and expediency. Judicial tribunals must treat legal rights and liabilities as pre-existing, because such tribunals declare themselves bound by a fixed objective standard; they profess not to confer rights or impose liabilities themselves, but only do what is dictated by law. But "administrative" tribunals, which act upon policy and expediency, themselves dictate what is politic and expedient; they are not concerned with pre-existing rights and liabilities, but themselves create the rights and liabilities that they enforce. A judicial tribunal looks for some law to guide it; an "administrative" tribunal, within its province, is a law unto itself. The same idea is often expressed in this way, that the discretion of an administrative tribunal, as opposed to a judicial discretion, is a "pure", "absolute" "complete" or "unfettered" discretion.' [22] After illustrating these propositions Mr. Gordon continues: 'For in truth a tribunal that itself creates legal rights and liabilities according to policy and expediency—in other words, makes its own law according to its own will—is certainly not doing anything new or unprecedented; it is performing functions of the oldest and most familiar kind. It is, in short, legislating. And those tribunals which have in the past been called "administrative" are simply legislative bodies. This may sound at first somewhat startling.' [23] But 'Restrictions on their area of power do not make legislative bodies any the less legislative. A tribunal

[21] Aristotle, Politica, iv, 14.
[22] 49 L.Q.R. 106.
[23] 49 L.Q.R. 112. Cf., however, M.P.R. 19. 'It is indeed difficult in theory and impossible in practice to draw a precise dividing line between the legislative on the one hand and the purely administrative on the other; administrative action so often partakes of both legislative and executive characteristics'. Cf. also M.P.R. 28. But a working distinction can be made between the

may differ from Parliament in nine out of ten characteristics; yet it will still be a legislative body if it possesses the one essential power, the power to make law, that is, to create new rights and liabilities by its own acts and according to its own will '.[24]

This proposes a basis for classifying powers rather than tribunals. Many bodies of the ' judicial ' type are commonly called ' administrative tribunals ' merely because they are outside the ordinary system of law courts. But we have to classify them according to the nature of their functions. A single tribunal may, of course, wield more than one type of power.[25] In this analysis judicial and administrative functions are to be distinguished, not because a judge does not administer, but rather because he administers ' law ' while the official administers ' policy '; and because ' law ' and ' policy ' are radically different in their respectively objective and subjective standards. Then we find that the subjective standard is the hall-mark of legislative (in its widest aspect, sovereign) power. The position amounts to this, that there is no inherent individuality in the administrator's powers : they must be borrowed either from the Legislature or from the courts. The whole realm of executive power, therefore, was covered by the terms of reference of the Committee on Ministers' Powers : (a) delegated legislation, and (b) judicial or quasi-judicial decision. (' Quasi-judicial ', as we shall find, is not really a separate category.) The Committee's analysis was based on exactly the same distinction as Mr. Gordon's. They regard a typical case of a ministerial power of decision as ' not judicial, because it is governed, not by a statutory *direction* to him to apply *the law of the land* to the facts and act accordingly, but by a statutory *permission* to use his discretion after he has ascertained the facts and to be guided by considerations of *public policy*. This option would not be open to him if he were exercising a purely judicial function '.[26] I have italicised the words which bring out Mr. Gordon's points.

This distinction between law and policy is really the issue between the two parties of critics. It was brought to a head in precise terms in Professor Robson's evidence before the committee. ' It was on this distinction, utterly false to my mind, between law

making of general rules and special rules—see Jennings 274. The Statutory Instruments Act, 1946, makes no attempt to define legislative instruments as such. In *Blackpool Corporation* v. *Locker* [1948] 1 K.B. 349, the Court of Appeal's decision turned on the question whether certain instructions in a Ministry of Health circular to a local authority were legislative (so as to limit delegated powers) or merely executive directions. Here there is an important legal distinction, on which depends the issue of ultra vires as well as that of publicity. See Evershed L.J. at pp. 385–6.

[24] 49 L.Q.R. 113.

[25] For examples see 49 L.Q.R. 108–10.

[26] M.P.R. 74.

and policy that the committee based its report.'[27] Sir Ivor Jennings' paragraphs on discretionary powers and on the functions of judges show, I think, that he also would reject the distinction.[28] This raises two questions : (i) does any such distinction exist? (ii) if so, is it of any assistance? A negative verdict on either of these will shake the foundations both of the committee's report and of a long line of decided cases.

I will suggest a reactionary answer to the first question. There is a vital difference between ' policy ' and ' law ', and this difference is at the root of much legal and constitutional doctrine. All law, of course, expresses policy. But policy, the expediency of the moment, must undergo a fundamental change before it can become law. There must be some ' act of transformation ', with us an Act of Parliament, before what is merely desirable becomes what is legally enforceable—*i.e.*, before new rights and duties can appear.[29] A *judicial* decision is never such an act. An *administrative* decision, when it changes the rights of private individuals, always is, in much the same way as an Act of Parliament itself. In this way ' policy ' is changed into ' law '. This idea is so familiar that one should apologise for printing it. But that it is the basis of the traditional distinction between powers will hardly be denied. The ' objective ' character of the judicial function is derived from a *standard* (even though sometimes a discretionary one) enjoined upon the courts by Parliament or by the common law. The canons of *policy* are eternally flexible and today's decision may be revoked tomorrow. But once a rule has become *law* it must so continue (unless repealed by due process) irrespective of its rightness, wrongness, convenience or inconvenience. It is, in theory at least, certain and binding.

In one sense, of course, it is true that ' the rules of common law and equity have in themselves been made by the judges, who are aware that, by taking a decision on a point of law, they are creating a precedent for future use and a rule for future action. . . . The

[27] Robson, 336. For his evidence, see p. 326. At p. 333 he gives a rather less confident opinion: ' In my view one can distinguish " policy " from " law " only in theory, and even then the distinction is doubtful '. For this opinion he is criticised by Dr. Allen, *Law and Orders*, 170–2. Dr. Allen, on the other hand, appears to be concerned only with ministerial ' judicial ' decisions (*ibid.* 168), *i.e.*, decisions which might be entrusted to the ordinary courts (*ibid.* 172). He does not, therefore, directly face the most difficult issue, which is how to control decisions which must inevitably embody ' policy '.

[28] Jennings, 269, 275. At p. 270 he classifies as ' pure policy ' decisions those ' which do not immediately interfere with private rights ' (as in foreign affairs). That is quite a different and novel usage.

[29] Common law (including, for this purpose, equity) of course exists independently of this process. This is possible because it professes not to be based on contemporary ' policy ' at all. The expression ' public policy ' in its common law sense is defined by a legal standard and is, in fact, a strictly technical term.

English rule of precedent deliberately confers a law-making function on the judges; but the process operates even where there is no such rule '.[30] But judicial 'law-making' differs entirely from the kind of legislation which proceeds from sovereign power: the judge in his judicial functions is allowed no *political* discretion. He is confined to a type of reasoning which is quite different from Parliament's. His discretions are 'judicial discretions', which must conform to a norm, however indefinable, and which are accordingly liable to review on appeal. Of this type are Sir Ivor Jennings' examples of sentencing criminals, awarding damages, granting equitable remedies, and divorce cases. They are fundamentally different from true *administrative* powers, where the discretion is merely the administrator's own idea of expediency, incapable of being declared wrong *in law* by any higher authority. The vital line of division is obliterated if all discretions are treated as in their nature the same.[31] All *powers* are discretionary; if they are not, they are *duties*.[32] But some powers differ from others none the less.

Is this difference then of any importance? This is harder to prove, for so much depends on individual judgment as to the value of ideals which are not wholly attainable. But it is safe to claim that the distinction between law and policy has obviously been the foundation, long unchallenged, of much judicial and constitutional argument.[33] For example, it underlies another cherished notion which may be in danger of disintegrating under the attacks of the same critics: the rule of law. The traditional meaning of this, in

[30] Jennings, 275.

[31] Cf. Robson, 35. He takes as an example the history of equity. But historical development may carry a power from one category to the other without upsetting the classification; cf. also Prof. Friedmann in 22 Australian L.J. at pp. 169–70. Gordon, 49 L.Q.R. p. 107, n. 33, questions whether the old Court of Chancery was not judicial even in early times. He contrasts the Star Chamber, 'a court of politicians enforcing a policy, not a court of judges administering the law': Maitland, *Constitutional History*, 263. Maitland also emphasised the difference between legal and political power in a well known passage about justices of the peace: 'Even if a discretionary power was allowed him, it was none the less to be exercised with a "judicial discretion"; it was not expected of him that he should have any "policy"; rather it was expected of him that he should not have any "policy"'. Collected Papers, i. 478.

[32] Administrative duties are often described as 'ministerial acts': see Robson, 394, and Gordon in 49 L.Q.R. 98 *seq.* Mr. Gordon states (at p. 105) that ministerial acts occasionally involve discretion, citing *Hetherington* v. *Security Export Co., Ltd.* [1924] A.C. 988 (P.C.), where certiorari was refused for reviewing a tax distress warrant even though the official who issued it had a discretion to proceed alternatively by action. I should prefer to say that ministerial duties are sometimes accompanied by *liberties* or *powers* (as analysed by Hohfeld—see Salmond, *Jurisprudence*, 10th ed., ss. 78–9). Both admit discretion, but only the latter admits judicial control, and then only where a judicial or quasi-judicial power is in question.

[33] See 49 L.Q.R. 107 n. 34.

its primary sense, is that we are ruled by law, not by policy.[34] Policy cannot, according to this theory, be applied to the subject until duly transformed into law by proper constitutional procedure. Dicey, by his broad and idealistic exposition of this doctrine and its corollaries, succeeded in fixing it clearly in the public consciousness. It is by adopting his own approach that his modern critics have been able to collect many of the exceptions which prove his rules.

Thus the rule of law and the separation of powers are, as Holdsworth observed, corollaries.[35] If the rule of law were an absolute dogma it would require the executive to have no *power* at all, only duties or liberties. Dicey did not, of course, contemplate that absurdity : he would deny ' wide discretionary authority ', not *any* discretionary authority, to the government. The rule of law is a matter of degree, in which all the exceptions must be weighed against the rule. To prove merely that there are exceptions proves nothing. But the notable contrast between our time and Dicey's is perhaps to be found not so much in the mere aggregation of powers in the hands of the executive as in the tendency to change the ideal and to regard government by ministerial discretion as the natural and proper solution of problems of social administration whether great or small. Many powers now conferred are indeed ' wide ' in Dicey's sense. Nor are they, as is often supposed, the inevitable result of the demands of detailed planning. Few reforms, for example, can have called for such minute scrutiny of local detail as the inclosures. Yet this great revolution in land tenure was carried out scrupulously according to the rule of law : by Act of Parliament in each separate case. But nowadays orders for slum clearance, compulsory purchase of large areas, new towns and many other very sweeping objects can be confirmed and made law at the uncontrolled discretion of ministers. It is useless to deny that this is the rule of policy, not the rule of law.[36] ' To this extent ', in Holdsworth's words, ' the rule of law has in effect been abrogated

[34] This general sense of the expression is very common, and more correct than Dicey's formulæ (*The Law of the Constitution*, 9th ed., 202–3). See, for example, *Re Kendrick's Agreement* [1948] 2 All E.R. at p. 103, where Harman J. said that as regards notices to quit agricultural holdings ' tenants are now at the mercy of the Minister rather than under the rule of the law as they used to be '.

[35] 55 L.Q.R. at p. 587. Hence Holdsworth concludes that ' the concept of the rule of law is a true juridical concept: it is no mere " principle of political action ". Dr. Jennings' statement to the contrary is the exact opposite of the truth '. This again is precisely the issue.

[36] This is, as I understand him, denied by Prof. Friedmann, ' The Planned State and the Rule of Law ', 22 Australian L.J. at p. 169. But he appears to treat the rule of law as satisfied if the ministerial powers have good social objects and are subject to parliamentary criticism. He thus exposes himself to the charge laid by Jennings against Dicey of treating the rule of law as a principle of political action, not a juridical principle (Jennings, 288).

by the Legislature.' But we are still left with a question of degree. Is not the rule of law still a very clear principle in several most important fields? Does it not sustain personal liberty, the independence of the judges, and Parliament's right to the ultimate control of the executive? Has it not helped to inspire the Crown Proceedings Act? We must admit that a wide field of social legislation has been surrendered and that it remains a question—though a difficult question, into which I must not here digress further—to what extent it ought to have been surrendered. But much remains, and there are gains as well as losses to be brought into account. We must, I venture to think, return to what the committee say of the correlative principle, the separation of powers: that, despite many exceptions, it is 'none the less real, and for our purposes important'.[37] And, above all, it must remain a 'juridical principle' if it is not to be worthless.

Without this preliminary statement of opinion—or perhaps of faith—we cannot expose the roots of the present conflicts of thought and language which surround the word 'quasi-judicial'. I shall proceed, as the committee proceeded, on the basis of the antithetical characters of 'law' and 'policy', despite the eminent authorities who call for the abandonment of this classification of powers. Their arguments tend to follow the line that because functions and powers may in particular cases be difficult to allocate precisely, therefore no basis for analysis exists. This is like saying that because purple is a confused mixture of red and blue, therefore red and blue are indistinguishable. On which side of the line does a borderline case lie? Legal 'definitions' are seldom free from this difficulty, but it is a mistake to be preoccupied with it exclusively. As Mr. Gordon remarks, practical difficulties will always remain. 'Equivocal or elliptical language in statutes can leave uncertainty whether powers are judicial or "administrative". However good a test is available, this cannot overcome uncertainty as to what Parliament means.'[38]

[37] Cf. Wade and Phillips, *Constitutional Law* (3rd ed.), 55–6.

[38] 49 L.Q.R. 116. A model example is *Cooper* v. *Wilson* [1937] 2 K.B. 309, where Scott L.J. (at pp. 340–1) found difficulty in applying the M.P.R. analysis to a borough watch committee's power to dismiss a police constable. Both Jennings (p. 280) and Robson (pp. 402–3) treat this as evidence that there is no clear or useful line of division between 'judicial' and 'quasi-judicial' (that is to say, administrative) powers. In fact it was merely a borderline case. By the Municipal Corporations Act, 1882, s. 191 (4), the watch committee was given a general power to dismiss constables. This could, one presumes, be exercised on grounds of 'policy', *i.e.*, quite arbitrarily. But by the Police Regulations made under the Police Act, 1919, s. 4 (1), watch committees were required to exercise their powers in a particular manner. It was arguable that this required them, thenceforward, to reach objective decisions, at any rate in disciplinary cases. Both Greer and Scott L.JJ. contemplated this question but did not decide it. It was immaterial, because in either case equally the rules of natural justice had to be observed. Admittedly, Scott L.J. cited the M.P.R. definitions based on procedure, which by themselves obscure the dis-

But Parliament can hardly be blamed for uncertainty when the test is neither generally recognised nor clearly defined. If it were once appreciated as a general principle of legislation I should be so bold as to predict that there would be much less cause to fear uncertainty in future.

THE QUASI-JUDICIAL FUNCTION ITSELF

We may now turn to the ' quasi-judicial ' function as conceived by the courts and by the committee. It is ' an administrative decision, some stage or some element of which possesses judicial characteristics '.[39] It does not, therefore, stand outside the fundamental classification of judicial and administrative powers : it is firmly placed in the *administrative* category. It is a decision which, in its final phase, ' ultimately turns on administrative policy ', ' not judicial but administrative '.[40] This is nowhere more clearly stated than in the passage which I have quoted on an earlier page.[41] Unfortunately the attention of critics has been focused rather on the preceding passage in the report where a more formal definition is attempted.[42] This, as they rightly point out, is unduly concerned with procedure. It might also be said that it takes the wrong approach : it treats the quasi-judicial process as a judicial process from which one or more elements are missing, rather than as an administrative process to which one or more judicial elements are added. Taken by itself, it is open to misunderstanding, being concerned with incidentals. For the universal distinction which underlies it, and which recurs throughout this section of the report, one has to look elsewhere. This, like many other distinctions of principle, is concerned not only with what does happen, but with what ought to happen—and is none the less important on that account.

tinction between ' law ' and ' policy ', although they are based upon it (see next paragraph and note 42).

39 M.P.R. 81.

40 M.P.R. 93.

41 Note 26, above.

42 M.P.R. 73. The passage is as follows: ' A true judicial decision presupposes an existing dispute between two or more parties, and then involves four requisites: (1) the presentation (not necessarily orally) of their case by the parties to the dispute; (2) if the dispute between them is a question of fact, the ascertainment of the fact by means of evidence adduced by the parties to the dispute and often with the assistance of argument by or on behalf of the parties on the evidence; (3) if the dispute between them is a question of law, the submission of legal argument by the parties; and (4) a decision which disposes of the whole matter by a finding upon the facts in dispute and an application of the law of the land to the facts so found, including where required a ruling upon any disputed question of law. A quasi-judicial decision equally presupposes an existing dispute between two or more parties and involves (1) and (2), but does not necessarily involve (3), and never involves (4). The place of (4) is in fact taken by administrative action, the character of which is determined by the Minister's free choice '.

One of the most familiar examples of an admittedly quasi-judicial function is the power of a minister to confirm a local authority's 'slum clearance' scheme under the Housing Acts.[43] Other examples are, as the committee say, easily found, and their catalogue should be consulted.[44] Many new examples have since been provided by statute, notably under the Town and Country Planning Act, 1947, and the New Towns Act, 1946.[43] All these are eminently matters of policy. The minister responsible has to consider whether it is expedient to demolish rows of bad houses, to ordain the creation of a new town, to confirm a development plan, or to stop 'existing use' of land. There is no law in the decision of these matters. The minister may decide as he pleases and no one can say what standard he should apply apart from considerations of pure expediency.

But the minister's decision is only the final step in a longer process, the process described in the committee's purported definition. Before the decision can be properly taken, facts have to be ascertained and private interests, if they are likely to be affected, must be considered. It is this preliminary stage, and this stage only, which is 'quasi-judicial'. The term applies only to the *procedure* which the minister is required to follow before he is free to exercise the unfettered discretion conferred upon him by the Act.[45] The general rule as to this procedure is that it must satisfy the requirements of 'natural justice'. This is a concept which the courts have evolved[46] and which means, essentially, that the minister must allow any interested party to state his objections and that any such objections must be disposed of with at least an outward appearance of detachment and objectivity. This is not a

[43] See note 1, above.

[44] M.P.R. 90–2.

[45] This is clearly stated by Maugham L.J. in *Errington* v. *Minister of Health* [1935] 1 K.B. at p. 273: 'My conclusion is that although the act of affirming a clearance order is an administrative act, the consideration which must precede the doing of that act is of the nature of a quasi-judicial consideration . . . .' Professor Robson (394) adopts Sir I. Jennings' view that this shows the absurdity of the language used to describe the powers given by administrative law. According to the analysis which I prefer to follow, it is one of the most helpful judicial statements in the reports. There are now two others, no less clear, (i) in *Robinson* v. *Minister of Town and Country Planning* [1947] K.B. at p. 716, where Lord Greene M.R. said: 'To say that in coming to his decision he (the Minister) is in any sense acting in a quasi-judicial capacity is to misunderstand the nature of the process altogether. I am not concerned to dispute that the inquiry itself must be conducted on quasi-judicial principles. But this is quite a different thing from saying that any such principles are applicable to the doing of the executive act itself, that is, the making of the order. The inquiry is only a step in the process which leads to that result . . .'; (ii) in *Johnson & Co.* v. *Minister of Health* [1947] 2 All E.R. at p. 400, where Lord Greene M.R. repeated the substance of what is quoted above.

[46] For the rules of natural justice see Wade and Phillips, *Constitutional Law*, 3rd ed., 274–7; M.P.R. 75 *seq.*

cynical description of the process, nor is it intended to be derogatory. It has to be remembered that when the minister has threaded his way through the forms required by the law, he is a free agent as to his final decision.[47] The whole theory of 'natural justice' is that ministers, though free to decide as they like, will in practice decide properly and responsibly once the facts have been fairly laid before them. At any rate, this is the utmost that the law can do to control the exercise of their discretion without invading the forbidden realm of policy. Arbitrary exercise of an administrative power the courts cannot control, for policy is in the last resort arbitrary. But much can be done to prevent an appearance of arbitrariness, and since in practice it is far more likely to be accidental than intentional, a procedure which satisfies 'natural justice' is the best insurance against such accidents. To those who think that our courts might have been more enterprising in controlling administrative powers I would venture to suggest that the manner in which our courts have developed 'natural justice' and fastened it onto powers which are purely political is really a remarkable achievement.

Once it is appreciated that judicial control is in this class of case confined to procedure prior to the final decision of policy, it is easier to understand the limits of the doctrine of 'natural justice'. It stops short of requiring the minister to hear the objecting parties in person,[48] to present his own case,[49] to disclose papers submitted to him in his own department by his own officials,[50] or to give reasons for his decision.[51] Nor, in pointed contrast to judicial proceedings, does it disqualify him because he has an outside interest in the way the decision goes.[52] All these divergences are mainly due to the difference between decisions of policy and decisions of law. This is not to say that fact-finding is any less important in the one case than in the other. It is merely to recognise that there is no necessary logical connection between the evidence given and the final decision of policy; and that the judicial fact-finding process is that best adapted to the administration of

[47] See note 42 above ('the Minister's free choice'). It follows that the decision need bear no relation to the evidence given at the public inquiry, and cannot be attacked on the ground that no sufficient evidence was put forward: *Robinson* v. *Minister of Town and Country Planning* [1947] K.B. 702 (C.A.). The decision of Henn Collins J. in *Phœnix Assurance Co.* v. *Minister of Town and Country Planning* [1947] 1 All E.R. 454 must now be regarded as wrong.

[48] *Local Government Board* v. *Arlidge* [1915] A.C. 120.

[49] *Re The Trunk Roads Act, 1936* [1939] 2 K.B. 515; *Franklin* v. *Minister of Town and Country Planning* [1948] A.C. 87.

[50] *Local Government Board* v. *Arlidge* [1915] A.C. 120; *Denby (William) & Son* v. *Minister of Health* [1936] 1 K.B. 337; *Robinson* v. *Minister of Town and Country Planning* [1947] K.B. 702 (C.A.) Cf. M.P.R. 102–3.

[51] *Robinson* v. *Minister of Town and Country Planning* [1947] K.B. 702 (C.A.)

[52] This is due to the statutory direction in each case.

law, while for the dispensation of policy the only practicable procedure is one which makes some concessions to the machinery of government departments. For example, the minister may decide the matter personally or he may act solely on the advice of officials, high or low. An objector may have to be content with submitting his objections in writing.[53] Except where there are disputed questions of fact, the department has no ' case ' of its own to put up which can be the subject of argument. Its ' case ' is its policy, and its policy is a matter not so much for decision by argument with any individual dissatisfied with it but for general political defence in Parliament. The same applies to a large extent to the vexed question of reasoned decisions. The Committee on Ministers' Powers were strongly in favour of reasons being given in all cases. The decision should, they said, take the form of a reasoned document stating the facts found and any conclusions on points of law, and in particular reasons ought to be given for any departure from the recommendations of a previous public inquiry. But it is expressly recognised that the minister should not be called upon to explain the policy which has dictated his decision.[54] The committee are there dealing in the same breath with both judicial and quasi-judicial decisions. But in the case of the latter the only subject for argument is the facts. The objectors may indeed say that in their opinion it will be a mistake to establish (for example) a new town at a certain place, and natural justice (in this case statutory) will compel the minister to allow such objections to be stated. But his reasons for rejecting them, if he does so, will in most cases be simply that he disagrees on general grounds. To require repeated statements of general policy in every individual case would be of doubtful satisfaction to the objectors and embarrassing to the department. It would also to some extent conflict with the rule that the primary place for the declaration and defence of political decisions is Parliament, where answers on particular cases can be obtained.[55] There may, however, be disputed

[53] But he may be entitled to elaborate them later so as to present his case in adequate form: *Stafford* v. *Minister of Health* [1946] K.B. 621.

[54] M.P.R. 100. The committee's proposals were approximately followed in the Restriction of Ribbon Development Act, 1935, s. 7 (4), but not in later statutes.

[55] See Lord Greene M.R. in *Robinson* v. *Minister of Town and Country Planning* [1947] K.B. at p. 717: ' How can this Minister, who is entrusted by Parliament with the power to make or not to make an executive order according to his judgment and acts bona fide (as he must be assumed to do in the absence of evidence to the contrary), be called upon to justify his decision by proving that he had before him materials sufficient to support it? Such justification, if it is to be called for, must be called for by Parliament and not by the courts, and I can see no ground in the language of the Act, in principle, or in authority for thinking otherwise '. And see Lord Greene's similar remarks in *Johnson & Co.* v. *Minister of Health* [1947] 2 All E.R. at p. 400: ' In a nutshell, the decision of the Minister is a thing for which he must be answerable in Parliament and his actions cannot be controlled by the courts '.

questions of fact which the minister or his advisers have to decide. It is with these, as we have observed, that the rules of natural justice are mainly concerned : the minister is a law unto himself, but the value of judicial control in the preliminary stages is that it makes him consider a statement of facts, as well as of opinions, from the objectors' angle. But reasons can seldom be given for findings of fact. It is certainly desirable that the facts found should be stated in writing, as the committee recommended. But reasons can hardly be demanded from a minister any more than from a jury.

It is far from my intention to argue against the giving of reasons generally. No one can doubt that it is the most valuable of practices and should be observed in many cases, irrespective of the letter of the law, more thoroughly than it is. What I wish to point out is that the main reason why the committee's general recommendation is not followed in practice is that a ' quasi-judicial ' decision is in its own nature less easily reduced to a reasoned form, and this on account of the difference between law and policy.[56] Progress is not likely to be made until this distinction is properly understood. Administrative tribunals in their *judicial* functions habitually give their reasons and there would rightly be an outcry if they withheld them. But to call for the same rule to be applied automatically to quasi-judicial functions is to ignore genuine difficulties. Those who advocate the giving of reasons in all cases must take it upon themselves to explain how this can be done in cases which contain little else than a fact-finding inquiry followed by a political decision. Some recent American criticisms are open to the same reply. ' Perhaps no other aspect of English administrative law strikes an American observer in so unfavourable a light as the failure to require reasons for administrative decisions. . . . the vastly more important role played by judicial review (in America) has made (reasoned) decisions necessary if the reviewing court is to be enabled adequately to perform its functions. The Administrative Procedure Act requires reasoned opinions in all administrative decisions.' [57] As is hinted by the reference to judicial review, the decisions in question turn out to be, according to English terminology, judicial rather than quasi-judicial. In America, ' quasi-judicial ' decisions appear to be judicial decisions taken by administrative agencies. In other words, the terms are used according to the tribunal deciding a case rather than (as with

[56] See Sir C. T. Carr, *Concerning Administrative Law*, 123: ' Perhaps it does not necessarily follow that non-judicial tribunals must give reasons. The grant or refusal of a licence need not be made the occasion for a full-dress statement of policy by the licensing body '.

[57] Schwartz in 63 L.Q.R. at p. 57.

us) according to the nature of the decision. A classic example is said to be the Federal Trade Commission, entrusted with the power of administering an Act which provides that 'unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are hereby declared unlawful'.[58] But this Act, of course, is the vital act of transformation which turns 'policy' into 'law'. The policy to be applied is *legislative* policy rather than *administrative* policy, and the function of the Commission is to declare law, not to create it. It is quite true that the policy is laid down in such general terms that the Commission is left free to invent its own standard of what is fair. But that standard, whatever it is, is presumably intended to be an objective one and (therefore) capable of judicial review. It is not, surely, intended to to be variable at the uncontrolled discretion of the Commission according to the inclinations of departmental policy at any particular moment.[59] Other American examples are to similar effect, and the power of decision by the enforcing agency is equally suitably referred to as 'judicial'. 'Many of these new powers of industrial supervision could, indeed, from an analytical point of view have been vested in the courts.'[60] But there were special reasons for preferring independent commissions, which would, it was thought, be more assiduous in enforcing legislative policy. These powers therefore correspond to *judicial* powers exercised by special tribunals in England, where such tribunals are preferred to the regular courts for one or more of the reasons recognised by the

[58] Schwartz in 64 L.Q.R. at p. 525.

[59] The new Monopolies and Restrictive Practices Commission is in some ways comparable to the American administrative agencies. Under the Monopolies and Restrictive Practices (Enquiry and Control) Act, 1948, the Commission may be asked to report whether certain facts 'may be expected to operate against the public interest' (s. 6 (1) (*b*)). This is a very broad standard but presumably an objective one (although no such activities become unlawful until so declared by ministerial order approved by resolution of both Houses of Parliament (s. 10)). It is notable that the Commission is required to state its reasons fully (s. 7 (1)) and that any report extending to 'public interest' must be published unless public interest itself requires the contrary (s. 9).

[60] *Ibid.* at p. 528. The absence of administrative policy in the American type of case underlies the following significant contrast. The principle advocated in America is that 'the one who decides must hear', and the Federal Administrative Procedure Act contains provisions which aim at this (see 63 L.Q.R. 52–5). This is of course modelled upon the practice of the courts. The M.P.R., however, recommended that, where the final decision is one of policy, the one who decides should *not* hear, *i.e.*, that the fact-finding process should be performed by an independent tribunal not concerned with policy: see M.P.R. 78–9, 94, 116. Thus it is thought right that American 'hearing officers' should take a decision upon the whole issue. In England, in quasi-judicial cases, it would be wrong in principle for inspectors holding public inquiries to reach any decision on the whole issue (see M.P.R. 93), for this is the minister's personal responsibility. Another contrast due to the same cause is that the American tribunals are required to decide on 'substantial evidence' (s. 10 (*e*) of the American Act), while in England there is no necessary connection between the evidence and the final decision—see below, p. 236.

Committee on Ministers' Powers and by most other critics.[61] Against the procedure of these tribunals there is on the whole little complaint—it is rather their unclassified and unclassifiable forms of constitution which attract criticism. The public's sense of grievance arises from powers which are the implements of purely executive policy. Do these exist in America? And, if so, have the courts shown the same enterprise as have our courts in imposing some kind of control over procedure when they have no power to review the final decision at all?

The rule of the English courts is to presume that 'natural justice' is required in the exercise of all statutory powers which depend on the existence of some state of facts, and which affect the rights of individuals, or where (as is now so common) any duty to inquire into facts or hear objections is imposed by Parliament.[62] The Committee on Ministers' Powers did not therefore find it very easy to give examples of their third category of powers, the 'purely administrative'.[63] These are powers to execute acts of policy free from any judicial control as to the preliminary procedure. Of the two examples given, one ('the decision of the Admiralty to place a Departmental contract for stores') is merely the power of contract possessed by private persons generally and not confined to the executive, and the other ('the decision of the Home Secretary to grant naturalisation to a particular alien') cannot alter anyone's existing rights and is a special case of statutory exemption from the normal rules.[64] The presumption is, therefore, that powers must be exercised subject to the procedure called 'natural justice' whenever they may adversely affect the legal position of particular individuals. These powers are all statutory, and the authority for confining them within certain procedural bounds is presumably the implied intention of the legislature. 'Natural justice' is therefore a branch of the ultra vires rule, though substantially it consists

[61] M.P.R. 97; Jennings, 281 *seq.*; Robson, 439 *seq.*

[62] The principle is a very wide one and is often stated in unrestricted terms: 'a duty lying upon everyone who decides anything' (Lord Loreburn L.C. in *Board of Education* v. *Rice* [1911] A.C. at p. 182, and cited in many later cases). But a 'decision' may be purely subjective, as in *Liversidge* v. *Anderson* [1942] A.C. 206, and so involve no *inquiry* to which natural justice would apply. Decisions under the New Towns and Town and Country Planning Acts might possibly fall into this class were it not for the statutory provision for inquiry, since the conditions for exercising the powers are merely 'if the Minister is satisfied'. The minister's duty to observe natural justice arises rather where his powers 'rest on something other than the state of his own mind, namely, the existence apart from his opinion of a state of things' (Henn Collins J. in *Franklin* v. *Minister of Town and Country Planning* [1947] 1 All E.R. at p. 398).

[63] M.P.R. 81.

[64] British Nationality and Status of Aliens Act, 1914, s. 2 (3). See now British Nationality Act, 1948, ss. 10, 26. For other absolute powers affecting aliens see *Ex p. Venicoff* [1920] 3 K.B. 72 (deportation) and *R.* v. *Bottrill*, *Ex p. Kuechenmeister* [1947] K.B. 41 (C.A.) (internment).

of certain settled principles created not by Parliament but by judicial interpretation.[65]

It has now become common for Acts of Parliament, when conferring powers of the quasi-judicial type, to lay down in some detail the procedure to be followed in considering objections.[66] When this is done the procedure of ' natural justice ' is, as it were, codified for the occasion. It may of course be modified in the process.[67] It might, indeed, be completely displaced by the statutory code if the latter were sufficiently comprehensive. But the courts have in most cases taken the attitude that even though the minister and his officials follow exactly the procedure laid down in the Act, it may still be possible for the implied conditions, ' the essence of justice ', to be violated by some act of an ex parte character during the period of inquiry when an outward appearance of objectivity has to be preserved by all means.[68]

It may be, however, that some revision of principles, or at least of terminology, is called for by the decision of the House of Lords in the Stevenage planning case.[69] The objectors' complaint was that the minister had made up his mind to approve the provisional order, and had so declared in public, before he had considered the objections made at the public inquiry. He could not, therefore, have ' considered ' these in the sense which the statutory procedure (interpreted according to natural justice) demanded, *i.e.*, without the external appearance of partiality. This complaint was upheld by Henn Collins J. at first instance,[70] though not in the Court of Appeal [71] (who differed from him as to the facts), or in the House of Lords (who differed from him both on facts and law). Throughout the case a remarkable diversity of views was expressed as to the nature of the minister's duties, and though it is to some extent a

[65] In *General Medical Council* v. *Spackman* [1943] A.C. at p. 640, Lord Wright appears to treat ' ultra vires ' and ' natural justice ' as two separate principles. But he proceeds to quote with approval some remarks of Lord Selborne L.C. in *Spackman* v. *Plumstead District Board of Works* (1885) 10 App.Cas. 229, which clearly attribute the latter to the former: ' there would be no decision within the meaning of the statute if there were anything . . . done contrary to the essence of justice '. Similar reasoning was used in *Errington* v. *Minister of Health* [1935] 1 K.B. at pp. 268, 279, by Greer and Maugham L.JJ. respectively.

[66] See note 1, above.

[67] For example, the Town and Country Planning Act, 1947, s. 10 (3) enables the Minister to disregard the decision in *Errington* v. *Minister of Health* [1935] 1 K.B. 249.

[68] As in *Errington* v. *Minister of Health* [1935] 1 K.B. 249, where further consultation between the ministry and the local authority, after the inquiry had been held but not in the presence of the objectors, was held to violate natural justice although the specific requirements of the Act had been fully met. A contrasting decision, though based upon the same principle, is *Horn* v. *Minister of Health* [1937] 1 K.B. 64 (C.A.).

[69] *Franklin* v. *Minister of Town and Country Planning* [1948] A.C. 87.

[70] [1947] 1 All E.R. 396.

[71] *Ibid.* 612.

matter of words it has also great significance in substance. The Attorney-General, whose argument eventually prevailed in the House of Lords, contended ' that at no stage is the Minister put in a quasi-judicial position, but that he acts throughout administratively, not only in making the original Order and in having a public inquiry . . . but also in considering the report . . . and in deciding whether or not to confirm his original Order '. He also contended that the sole use of the liberty to make objections was that the objectors might ' blow off steam ' and so rally public opinion, ' to which alone the Minister might bow '. The learned judge, on the other hand, regarded the minister's duty as purely judicial throughout : ' I was invited to say that, even if the Minister was ever required to act judicially, it was enough if he fairly considered the objections, and that at that point his judicial capacity ceased so that he could then properly allow the administrator, at the critical moment of decision, to get the upper hand. . . . I cannot accept (that contention). It is idle to say that a judge has functioned properly if all that he has done is to see that the case is conducted in seeming fairness (without, for example, hearing one party behind the back of the other, and so on) and even to apply his mind to the evidence, unless he has also brought an open mind to the decision. Any other view would reduce the necessity for fairness, or the appearance of it, to a farce '.[72]

Pausing here, we observe a case which is, on its face, clearly in the ' quasi-judicial ' class so carefully analysed by the Committee on Ministers' Powers. The final decision must obviously be one of policy : shall there or shall there not be a new town at Stevenage. No minister can have, at the same time, a policy and (in this sense) an open mind. We have already noticed the reasons why the requirement of the *appearance* of fairness is anything but a farce —and this despite the fact, clearly recognised by the committee, that ' at the critical moment of decision ' the administrator must get the upper hand.[73] Yet, in the *Stevenage Case*, no one regarded the function as quasi-judicial at all : the Attorney-General (and the House of Lords) maintained that it was purely administrative, the learned judge (and, it would seem, the Court of Appeal) that it was purely judicial.

It is at this point that the question of ' policy ' becomes entangled with that of ' bias '. It is impossible to separate them

[72] *Ibid.* at p. 399. At p. 398 the learned judge used the expression ' quasi-judicial ', but said that it would reduce the inquiry to an absurdity if ' when all has been said and done, the Minister could disregard the whole proceedings and do just as he pleased '. But if the minister were bound to decide according to the evidence, his decision would of course be judicial, not quasi-judicial, in the ordinary sense of these terms.

[73] See notes 40 and 42, above.

unless it is remembered that natural justice requires only a fair *form* of procedure before the final decision, and, this being satisfied, stops short of controlling the final decision itself. If the minister has come safely through the prescribed course, and provided (it must be added) that he acts in good faith, he is then at liberty to decide as he likes free of all legal trammels. If he secretly decides by tossing a penny, or by drawing lots, there is no process by which the substance of his decision can be attacked—though if he *discloses* that he has so decided, this might be accepted as evidence that he has not considered the objections. The essence of the matter, by contrast with a *judicial* case, is that there is no necessary connection between the proceedings at the inquiry and the final decision.[74] What he must avoid is any unfair method of fact-finding or any statement implying that he will not pay, or has not paid, regard to the facts when found. Either of these would violate the rule 'audi alteram partem' (or its statutory counterpart requiring a minister to hold an inquiry and 'consider' the inspector's report), which is a rule of *procedure* merely. This is the type of 'bias' which will vitiate the quasi-judicial forms. The minister's policy, however loudly he proclaims it, will not vitiate it by itself. For, of course, the minister is required by Parliament to have a policy and it is absurd to suppose that Parliament puts duties upon him with the intention that he shall lay his policy aside while he performs them. The other maxim of natural justice, that 'no man shall be a judge in a cause in which he has an interest', is therefore subject to this severe qualification: the 'judging' in a quasi-judicial case is only the process of hearing and considering the objections—it cannot relate to the final decision, for that depends on 'policy', not 'justice'.[75]

We may now follow the *Stevenage Case* further. In the Court of Appeal the judgment of Henn Collins J. was reversed on the facts. The Court were prepared to assume that the minister's speeches displayed 'bias' of the material kind, but held that there was no evidence that this bias continued to influence him at the moment of his final decision. In other words, he had (as his affidavit declared) genuinely considered the objections before concluding 'that it was expedient in the national interest' to make the order. This was what the Act required and natural justice could require no more. In the words of Lord Oaksey L.J., 'the only obligation which, in my opinion, rests on the Minister after

[74] See notes 42, 45 and (especially) 55, above.

[75] This is why the M.P.R. suggested the separation of the two stages (see note 60, above). 'But now the Committee on Ministers' Powers has discovered a new kind of bias, namely, the interest that an enthusiastic minister might have in his official work'. Sir C. T. Carr, *Concerning English Administrative Law*, 121.

that inquiry has been held is fairly and bona fide to consider the report . . .'.[76]

This view of the case was upheld in the House of Lords, but Lord Thankerton (in whose opinion the whole House concurred) went on to make some important observations on the general law. These appear to raise, once again, some terminological problems: 'In my opinion, no judicial or quasi-judicial duty was imposed on the respondent, and any reference to judicial duty, or bias, is irrelevant in the present case. The respondent's duties under section 1 of the Act and Schedule I thereto are, in my opinion, purely administrative, but the Act prescribes certain methods of, or steps in, discharge of that duty. . . . I am of opinion that no judicial duty is laid on the respondent in discharge of these statutory duties and that the only question is whether he has complied with the statutory directions to appoint a person to hold the public inquiry, and to consider that person's report. . . . My Lords, I could wish that the use of the word "bias" should be confined to its proper sphere. Its proper significance, in my opinion, is to denote a departure from the standard of even-handed justice which the law requires from those who occupy judicial office, or those who are commonly regarded as holding a quasi-judicial office, such as an arbitrator. The reason for this clearly is that, having to adjudicate as between two or more parties, he must come to his adjudication with an independent mind, without any inclination or bias towards one side or the other in the dispute'.[77] His Lordship went on to refer to well known decisions about bias in strictly judicial proceedings. He agreed that the question of bias would have been raised had the respondent's function been quasi-judicial, but that proposition he had already rejected.

Here, in the first place, is a new set of terms. According to the analysis made by the Committee on Ministers' Powers, and according to the long line of decisions from *Arlidge's Case* to *Robinson's*, a minister's duty to hold a public inquiry and consider objections before confirming an order is the typical example of the *quasi-judicial* function: a controlled fact-finding procedure followed by an uncontrolled decision on policy. An arbitrator, on the other hand, is an eminently *judicial* functionary: he has no concern with executive policy, and his task is to find facts and dispense justice to the parties in an entirely objective manner. He may often have to give what the committee say can never be quasi-judicial: 'a decision which disposes of the whole matter by a finding upon the facts in dispute and an application of the law of the land to the

[76] [1947] 1 All E.R. at p. 618.
[77] [1948] A.C. at pp. 102–3.

facts so found . . .'.[78] In Lord Thankerton's context the term 'quasi-judicial' seems to be used in roughly the same sense as in America, meaning a judicial power to decide a true lis inter partes [79] entrusted to a person or tribunal other than the ordinary courts. In both cases the vital connection with 'policy' does not exist.

But this is more than a matter of words. For Lord Thankerton then proceeds to the conclusion that in such a case the minister is under no duty of any kind other than that of conforming to the statutory procedure. His actions throughout are 'purely administrative', as much so during the statutory 'steps' as in the final moment of decision. This presents two substantial difficulties. In the first place, it seems to imply that if there were no statutory requirements as to procedure the minister would be under no duty whatsoever. If this is the law, many previous decisions of the courts on the duty of administrative authorities to conform to 'natural justice' are wrong. In the second place, it at least implies that where there *is* a statutory code of procedure the minister has no other duty than to observe it. If this is the law, the principles on which the Housing Acts cases were decided are wrong. For it is significant that both the Housing Acts, 1930 and 1936, contain the usual type of schedules as to procedure in the case of compulsory purchase and clearance orders, and all these schedules have the same provision as the New Towns Act, 1946, requiring the minister (in case of dispute) to arrange a public inquiry and to consider the report of the person conducting it. Indeed, the Housing Acts go further and require him to consider not only the report but also 'any objection not withdrawn'. Yet these cases proceeded on the principle—which by all previous authorities appeared to be right—that the minister had not only to conform to the letter of the statutory code but also to avoid offending against the spirit of 'natural justice': or, to put it more

[78] M.P.R. 73. By way of contrast, Lord Loreburn's reference to an arbitrator in *Board of Education* v. *Rice* [1911] A.C. at p. 182 is treated by Lord Greene M.R., as indicating a true *judicial* issue, *i.e.*, a 'lis inter partes' in the proper sense: *Johnson & Co.* v. *Minister of Health* [1947] 2 All E.R. at p. 405.

[79] It is often said that there is also a *lis* in quasi-judicial cases where, as in the Housing Acts cases, the issue is put forward as one between the local authority and the objectors. But this is misleading, for it implies that the minister's decision must be given according to the evidence disclosed by the two 'parties', whereas in truth it is a matter of policy. The fallacy of the *lis* concept in 'policy' cases is pointed out by Lord Haldane in *Local Government Board* v. *Arlidge* [1915] A.C. at p. 134; by Lord Greene M.R. in *Johnson & Co.* v. *Minister of Health* [1947] 2 All E.R. at p. 399; and by Mr. Gordon in 49 L.Q.R. at p. 111. It is confusing, moreover, to find the term 'lis' used in a quite different sense for the stage when the rules of natural justice apply: *Errington* v. *Minister of Health* [1935] 1 K.B. 249; *Frost* v. *Minister of Health* [1935] 1 K.B. 286; *Offer* v. *Minister of Health* [1936] 1 K.B. 40; *Stafford* v. *Minister of Health* [1946] K.B. 621; *Miller* v. *Minister of Health* [1946] K.B. 626; *Price* v. *Minister of Health* [1947] 1 All E.R. 47.

precisely, that the statutory code, upon a true construction, embraced 'natural justice' in its full and usual sense. Admittedly it was in but two of these cases that the objectors succeeded.[80] But they were all decided upon the hallowed and oft cited principles laid down by the House of Lords itself in *Board of Education* v. *Rice*[81] and *Local Government Board* v. *Arlidge*.[82] 'My Lords, when the duty of deciding an appeal is imposed, those whose duty it is to decide it must act judicially. They must deal with the question referred to them without bias, and they must give to each of the parties the opportunity of adequately presenting the case made. The decision must be come to in the spirit and in the sense of responsibility of a tribunal whose duty it is to mete out justice.'[83] . . . 'They can obtain information in any way they think best, always giving a fair opportunity to those who are parties to the controversy for correcting or contradicting any relevant statement prejudicial to their view.'[84] In these passages 'they' includes 'authorities whose functions are administrative' and, in particular, 'those who are to make orders'.[85] These elementary statements were adopted and refined in the series of later cases and it was never doubted that they were to be applied, in all their proper implications, to decisions of precisely the same general character as in the *Stevenage Case*. Statutory codes of procedure were regarded as supplementing, not as abrogating them.

Even where, as in the New Towns Act, the statutory code would seem to leave few loopholes for acts of 'bias' of the relevant procedural kind, there is surely some value in preserving the principle that the proceedings must also satisfy the established judge-made standard of objectivity. For, if this principle is recognised, there is always an ultimate safeguard in the courts, and aggrieved parties need not rely exclusively on such procedure as the draftsman has thought fit to provide for them in any particular Act. 'Natural justice' is fairly secure if it can be taken away only by express provision in the Act, for any such provision will attract the attention of critics. If it will lapse by the mere silence of the statute it is far more precarious and its value as a general doctrine is largely destroyed.

But the *Stevenage Case* implies a new attitude, a shift from the

[80] *Errington* v. *Minister of Health* [1935] 1 K.B. 249, and *Stafford* v. *Minister of Health* [1946] K.B. 621. *Board of Education* v. *Rice* [1911] A.C. 179 and *Marriott* v. *Minister of Health* [1937] 1 K.B. 128, were not 'natural justice' cases.

[81] [1911] A.C. 179.

[82] [1915] A.C. 120.

[83] Lord Haldane [1915] A.C. at p. 132.

[84] Lord Loreburn L.C. [1911] A.C. at p. 182.

[85] Charles J. [1946] K.B. at p. 624.

common law's 'natural justice' to a more restricted doctrine of statutory interpretation. *Arlidge's Case* and its successors were not mentioned in Lord Thankerton's speech and it would be dangerous to suppose that he had any direct intention of questioning them. But it is, at the moment, difficult to foresee how they and the *Stevenage Case* will in future stand together. Lord Thankerton's remarks were of a general kind and obviously do not support such barren distinctions as that he was dealing only with the New Towns Act, or with cases where the minister is himself one of the 'parties' to the 'dispute'.[86] There is always the refuge that each case depends upon the interpretation of its governing statute, and that the Housing Acts, for example, are to be interpreted subject to the judge-made principles of 'natural justice', while the New Towns Act is not. If the basis of natural justice is, as has been suggested, implication of statute, it may always be possible for it to be extracted from the terms of any future Act. But the fact remains that the *Stevenage Case* represents a sharp check to the development of judicial control of policy decisions which has been established by degrees over many years. The extension of this control to the modern type of planning Acts (such as the Housing Acts) was a striking judicial achievement, and the preservation of a general standard of fairness was 'a matter of the greatest possible public importance'.[87] In the long run the *Stevenage Case* may prove an even more important turning point than *Arlidge's*. But for some time it may be unclear whether it changes law, or terminology, or both. At any rate it has dealt a severe blow to the established use of 'quasi-judicial', as defined by the Committee on Ministers' Powers and applied in so many leading cases. How long 'natural justice' will survive must for the time being remain an open question. But it is surely safe to say that its destruction will be a loss to the law. Might it not yet be saved by attention to the analysis of powers, and the meanings of words?

[86] See note 79, above.
[87] Maugham L.J. [1935] 1 K.B. at p. 280.

LAND CHARGES AND NOTICE

S. J. Bailey

The Property Acts of 1925 have restricted in several ways the old equitable doctrine of notice. This article is an attempt to bring together and summarise some of the effects and problems which result from one of the innovations which the Acts introduced to that end.[1]

Section 10 of the Land Charges Act, 1925, enacts that certain 'charges on, or obligations affecting, land' may be registered as land charges in His Majesty's Land Registry. Some of these registrable charges have long been recognised as imposing an equitable burden upon the land concerned, and for present purposes we may confine our attention to two of them: (i) estate contracts, (ii) restrictive covenants. By 'estate contract', the section means a contract by an estate owner to convey or create a legal estate. By 'restrictive covenant' it means a covenant or agreement (not made between a lessor and lessee) restrictive of the user of land.

Both estate contracts and restrictive covenants are registrable if created *after* the Act came into force. But those which were already in existence *before* the Act are subject to a distinction: restrictive covenants older than the Act are not registrable—section 10, indeed, so defines a restrictive covenant (for the purposes of the Act) as to exclude them from the Act entirely; estate contracts older than the Act, however, do sometimes become registrable, namely, 'if acquired under a conveyance' (*i.e.*, if the person who has the benefit of the estate contract assigns it) after 1925.[2] This distinction, of course, is important and should be borne in mind. In the remainder of this article, however, we may ignore it and assume that any pre-Act estate contract to which we may refer has not changed hands. We shall assume, therefore, that our estate contracts, like all restrictive covenants, are not

[1] Most if not all of these effects and problems are mentioned in the current treatises on the Law of Property and Conveyancing.

[2] This peculiarity of estate contracts applies equally to the other charges which are registrable under *Class C* of s. 10—*e.g.*, legal mortgages not protected by deposit of title deeds ('puisne mortgages'). If created before 1926 and assigned after 1925, they should be registered within a year after the assignment, otherwise they are not enforceable against a subsequent purchaser for value of any interest in the land: s. 14 (2).

registrable under the provisions of the Land Charges Act unless they were created after 1925.

It so happens that each of these two charges or obligations has a twofold effect. At common law, each is a mere contract which, like most other contracts, binds the parties who made it and their personal representatives after them—we may ignore for the present the more extensive operation of covenants contained in a lease.[3] In each case, however, the Court of Chancery intervened so as to extend in equity the force and scope of the obligation. First, the Chancery provided for each case a better remedy than the mere damages which common law offered on breach of such a contract—the compelling remedy of specific performance or injunction. Second, the Chancery would in each case compel even strangers to the contract, who afterwards acquired the land in question, to observe the contractual promise. This latter equitable extension of the duty imposed by our contract or covenant enables us to say that its burden 'runs with the land in equity' or, more shortly, that it is an 'equitable incumbrance' upon the land. And, being a merely *equitable* incumbrance,[3] it does not avail against strangers to the contract who, in good faith and for value, acquire a legal estate in the encumbered land without actual or constructive notice of its existence.

1. The Land Charges Act

It is clear that the Land Charges Act was directed against the 'incumbrance' aspect of these obligations.[4] In section 13, the section which prescribes the penalty for a failure to register, there is nothing to free the original parties or their personal representatives from their contractual liability: see *Wright* v. *Dean* [1948] Ch. 686, noted *post*, p. 269. What the section says is simply that our unregistered estate contract or restrictive covenant (if made after 1925) 'shall be void against a purchaser of a legal estate for money or money's worth'. Accordingly, a failure to register frees no one other than a purchaser for value—we shall so describe him for the sake of brevity—acquiring a legal estate in the encumbered land and (presumably) his successors in title also.

This Act, however, says nothing of any positive advantage to

[3] The burden of an estate contract or restrictive covenant contained in a *lease* sometimes runs even at *law* with the lease or reversion: see *Spencer's Case*, 5 Co. Rep. 16a; Law of Property Act, 1925, s. 142. A restrictive covenant between lessor and lessee is not registrable as a land charge. But an estate contract between lessor and lessee is so registrable, even, it seems, if it runs at law—*e.g.*, an option to renew the lease: see *Sharpe* v. *Coates* [1948] 2 All E.R. 871; and compare *Wright* v. *Dean* [1948] Ch. 686, noted *post*, p. 269.

[4] Section 10, which says what may be registered, is speaking of 'charges on, or obligations affecting, land'.

be gained by registering a land charge. It does not say, for instance, that a registered restrictive covenant binds all comers to the land. One registers such a land charge in order to save it from the penalty imposed by section 13—in order that that section shall not make it void against the purchaser for value. If it is duly registered, the Act does not harm it; but if it contains some flaw which, on equitable or other general principles, prevents it from operating as an incumbrance, the fact that it has been registered is no cure. If, for instance, a promise to convey a legal estate is made without valuable consideration, or is made to a promisee who subsequently behaves inequitably, or if a restrictive covenant is made with no intention to benefit other land, equity has never regarded that promise or covenant as creating any interest or charge which can bind those who subsequently acquire the land in question.[5] Accordingly, such a promise or covenant creates no 'charge on, or obligation affecting, land' within the meaning of section 10 of the Act and so is completely outside the Act's provisions. It may well be that the register of land charges contains many such impotent 'estate contracts' and 'restrictive covenants'—particularly the latter.[6] But, registered though they be, they are impotent still.[7]

2. THE LAW OF PROPERTY ACT

The Land Charges Act, as we have seen, lists the charges that may be registered (section 10) and provides a limited penalty for failing to register them (section 13). But it is not the only statute on the point. Its contemporary, the Law of Property Act, 1925, adds two further provisions. Of these, section 198 enacts that the due registration of a land charge 'shall be deemed to constitute actual notice' thereof 'to all persons and for all purposes connected with the land affected'. Its converse, section 199, enacts that no purchaser for value in good faith shall be prejudicially affected by notice of any registrable charge which (under the provisions of the Land Charges Act) is void against him by reason of the non-registration thereof.

[5] For the rules which determine whether a contract to sell or to let creates an equitable interest, see *e.g.*, Cheshire, *Modern Law of Real Property*, 5th ed., pp. 144–146, 340, 667. For those which determine whether a restrictive covenant operates in equity as an incumbrance, see, *ibid.*, pp. 301–311.

[6] The Land Charges Rules, 1926, r. 1 (6), expressly provide that the Registrar 'shall not be concerned to inquire into or otherwise verify the accuracy or validity of any matter or thing stated' in any application made to him for a registration. See also *Williams on Title*, pp. 71–72, 502, and *post*, footnote 15. An order may be obtained from the court for the cancellation of an entry in the register: see s. 10 (8) of the Land Charges Act.

[7] Though ineffectual in legal theory, they are likely in fact to injure the estate owner so long as they remain on the register—*e.g.*, they are likely to deter prospective purchasers. For the court's power to order their removal from the register, see preceding footnote

Dealing as they do with the question of *notice*, these two sections are evidently directed primarily at those registrable charges which, like our estate contract and restrictive covenant, are mere *equitable* incumbrances. By the old rule, the purchaser of a legal estate for value is bound by equitable interests only if he has notice of them. By the new rule, which applies only to those few interests which are registrable, he is bound by them only if they are on the register.[8] Let us now consider this new rule a little further :

(i) *Unregistered registrable charges* (s. 199). It was to be expected that the Acts of 1925, having provided a register for land charges and a rule (L.C.A., s. 13) that failure to register makes the charge void against purchasers of legal estates for value, would safeguard that rule by enacting further that the unregistered charge is none the less void although such purchasers may know or have notice that it exists. Accordingly, the equitable doctrine of notice, actual or constructive, is displaced (by section 199, above), where our equitable charge is void against the purchaser for want of registration.[9]

An important practical application of this change in the law is its effect upon tenants who are holding under a mere agreement for a lease, in reliance upon the equitable tenancy which (by virtue of the rule in *Walsh* v. *Lonsdale*) such an agreement gives to them. A contract or agreement to grant a lease is now registrable as an ' estate contract '. If not so registered it is accordingly void (unless it was made before 1926) against a purchaser of the land for value. The old misleading maxim that an agreement for a lease is as good as a lease [10] is therefore nowadays even more misleading than it used to be, unless re-stated in the light of the new law—*e.g.*, by adding, ' provided that, if made after 1925, that agreement has been duly registered as an estate contract '. Similarly, the old rule whereby purchasers of land had constructive notice of the equitable rights (if any) of persons known to be in actual possession

[8] But see footnote 9, *infra*.

[9] There would seem to be a slight difficulty here, in that s. 199 (read with s. 205) applies only to a purchaser *in good faith*, whereas the Land Charges Act avoids the unregistered charge against the purchaser without making that requirement: s. 205 (1) (xxi) implies a requirement of ' good faith ' except where the Act ' expressly ' excludes it; and s. 199 does not so exclude it. On the other hand, the opening words of s. 205 (' In this Act unless the context otherwise requires . . .') perhaps allow its exclusion by implication. There is a like difficulty about the antinomy of valuable consideration (in ss. 199 and 205) and ' money or money's worth ' (in L.C.A., s. 13).

[10] See *e.g.*, Cheshire, *Modern Law of Real Property*, 5th ed., pp. 144–147. Before 1926, the maxim was reasonably accurate only if the tenant, with his mere agreement for a lease, was actually in occupation of the premises, so that purchasers would be bound to have constructive notice of his equitable rights: see *Hunt* v. *Luck* [1902] 1 Ch. 428, *infra*.

of the land [11] has lost much of its importance, since it chiefly concerned persons in possession under a mere agreement for a lease. Nowadays, their equitable rights as such (unless older than the Property Acts) are registrable as 'estate contracts' and are therefore dependent now upon registration and not, as formerly, upon the doctrine of notice.[12]

On like reasoning, it seems to be arguable that even equitable mortgages by deposit of title deeds are registrable as *estate contracts*, inconvenient and deplorable though this result would be. The principle, it is said, upon which a deposit of deeds for securing a loan operates as an equitable mortgage or charge, is that equity regards it as evidence of a contract to create a legal mortgage—a contract of which equity might order specific performance.[12a] If this is indeed the basic principle, one is driven reluctantly to the conclusion that equitable mortgages by deposit, made after 1925 and not registered, are void against the purchaser of a legal estate for money or money's worth, whether or no he has notice of them. Admittedly, section 13 of the Law of Property Act provides that '*This* Act shall not prejudicially affect' any person's right or interest consequent upon the possession by him of any documents relating to a legal estate. But the Land Charges Act seems to contain no such protective provision; and it is the Land Charges Act that avoids unregistered estate contracts.[12b]

(ii) *Registered charges* (s. 198). Section 198 of the Act, whereby registration operates as notice to all persons, states in its opening words that this automatic notice results from the 'registration of any instrument or matter under the provisions of the Land Charges Act'; and its concluding words are 'this section . . . applies only to matters required or authorised to be registered under the Land Charges Act, 1925'. These words evidently restrict the section to

[11] The rule, as formulated by the Court of Appeal in *Hunt* v. *Luck* [1902] 1 Ch. 428, 433, was as follows:—'If a purchaser or mortgagee has notice that the vendor or mortgagor is not in possession of the property, he must make inquiries of the person in possession—of the tenant who is in possession—and find out from him what his rights are, and, if he does not choose to do that, then whatever title he acquires as purchaser or mortgagee will be subject to the right or title of the tenant in possession'.

[12] Section 14 of the Law of Property Act, 1925, is irrelevant here. It enacts merely that 'This Part (*i.e.*, ss. 1–39) of this Act shall not prejudicially affect the interest of any person in possession'. It cannot therefore preserve possessors against the registration rules, for those are imposed by s. 199 of that Act, and by the Land Charges Act.

[12a] See Hanbury and Waldock, *Law of Mortgages*, 51, 56–58, and authorities there cited. The deposit of deeds is regarded, *semble*, as a sufficient act of part performance of the contract: *ibid.*

[12b] Although s. 13 of the Law of Property Act perhaps ousts s. 199 (1) (i) in such a case, it is conceived that, even without the latter section, notice of an estate contract which is void against one (for non-registration) cannot have any effect.

charges that are *properly* registrable under that Act. It therefore follows that charges which are outside that Act, such as pre-1926 restrictive covenants and (with the trifling exception already noted) pre-1926 estate contracts, are outside section 198 also. Accordingly, although one might succeed in registering a pre-1926 restriction, by so registering it one would not give notice of it to 'all persons'. A purchaser who searches the register and finds it there will doubtless have *actual* notice of it, since he now actually knows of its existence. Whether a purchaser who fails to search the register would be held in equity to have *constructive* notice of it, on the ground that a prudent purchaser would have searched and so would have found it there, is not easy to say.[13] In practice this particular problem is unlikely to arise, since the details which one must supply when registering a charge include the date of its creation.[14] Yet it is important to remember that these restrictive covenants and estate contracts, created before 1926, are still governed by the old doctrine of notice, actual and constructive, and not by the registration rules.

An almost identical problem would arise if a restrictive covenant *made between a lessor and lessee* were entered in the register of land charges.[15] Such a covenant is expressly excluded from the registration provisions of section 10 of the Land Charges Act, even if it is made after 1925. So here, again, its registration cannot operate (under section 198) as automatic notice to all persons; yet if we assume that all purchasers of land ought to search the register it follows that they will have notice of it by virtue of the old doctrine. That assumption is safe enough as regards purchasers of the fee simple—*e.g.*, where *A* buys the fee simple in Blackacre from *B* who has made a restrictive covenant about it in a lease of Whiteacre. But 'purchaser' is a word wide enough to cover a person who buys a mere lease or under-lease, and it is

[13] It seems probable that he would be held to have constructive notice in such a case. The doctrine of constructive notice does not apply to documents (such as the trust instrument under a trust for sale) in which a prudent purchaser would not expect to find anything to concern him. But the register is a document made for the very purpose of recording information of concern to him—though not the particular kind of information (a charge which ought not to be registered) which we are supposing to be there.

[14] Land Charges Rules, 1925, r. 6. But the Land Charges Rules, 1926, r. 1 (6), expressly exempt the Registrar from any duty to 'inquire into or otherwise verify the accuracy or validity' of any statement or matter when he receives an application for a registration; see also footnote 15, *infra*.

[15] Probably the words 'made between a lessor and lessee' (in L.C.A., s. 10) were intended to refer only to covenants contained in a lease or agreement for a lease. When one applies for the registration of a land charge one need not show the Registrar the documents, if any, which created it unless he specifically requires one to do so (Land Charges Rules, 1925, r. 9); and he is under no duty to verify the particulars which one gives of it: see preceding footnote.

possible to argue (in view of section 44 (2) of the Law of Property Act) that such purchasers as these need not search the register for charges imposed upon the property by their reversioners—whose names, indeed, they may not even know. On the other hand, such authority as there is about charges which are *properly* on the register—*e.g.*, a restrictive covenant which the reversioner imposed upon the property in a conveyance of other land—is very strict in these cases; for it seems that even purchasers acquiring a mere lease or sub-lease, being comprehended within the words 'all persons' of section 198, have automatic notice of anything properly registered, and this even though they are disabled from finding it in the register because it is registered against a name which they do not know.[16] For covenants made between a lessor and lessee, however, the doctrine of notice is not always relevant, since *assignees* of the lease or reversion (unlike underlessees and others) are bound by them, if at all, at *law* (rule in *Spencer's Case*; L.P.A., 1925, s. 142).[17]

Again, section 198 has no application to *impotent* estate contracts and restrictive covenants—those which, being defective in some way, are not true incumbrances at all.[18] Since they do not operate as incumbrances on the land, they are not 'charges on or obligations affecting land' within the meaning of section 10 of the Land Charges Act, and are therefore not properly registrable as land charges. Hence, although one may contrive to register them, their registration is not 'required or authorised . . . under the Land Charges Act', and so the very words of section 198 exclude them. Moreover, even if section 198 were applicable to an

[16] See *White* v. *Bijou Mansions* [1937] Ch. 610, 617, *per* Simonds J., obiter: Wolstenholme and Cherry, *Conveyancing Statutes* (12th ed.), 298. Section 44 of the L.P.A., 1925, enacts that, unless there be a contract to the contrary, (i) neither lessees nor sub-lessees nor their assignees can 'call for' the title to the freehold, (ii) neither sub-lessees nor their assignees can 'call for' the title to the leasehold reversion. Moreover, subs. 5 of that section (reversing the rule in *Patman* v. *Harland*) enacts that when they are thus unable to 'call for' the title to the freehold or leasehold reversion they 'shall not be deemed to be affected with notice' of anything which that title would have revealed to them. It seems, therefore, that this subsection frees them from *constructive* notice of any unregistrable equities (even those improperly on the register) which have been imposed upon that freehold or leasehold title. On the other hand, anything which is *properly* on the register is a different matter, for s. 198 gives actual notice of that 'to all persons and for all purposes'. In this latter case, therefore, there is a conflict between the two sections; but the authorities cited above indicate that s. 198 prevails. See further, Dr. D. W. Logan's article, *Patman* v. *Harland Today*, 56 L.Q.R. 361–375.

[17] It is apprehended that a negative covenant which does not 'touch and concern the land' within *Spencer's Case* cannot ordinarily run in equity under the rule in *Tulk* v. *Moxhay*, and that such decisions as *Hall* v. *Ewin* (1887) 37 Ch.D. 74, will nowadays be followed only where the lessee's covenant is beneficial to the lessor's reversion.

[18] See footnotes 5, 6 and 7, *ante*.

impotent charge entered on the register, the section could not cure or strengthen it : for the section enacts only that all persons shall have notice of it; and notice of something that is not an incumbrance affects no one.

Finally, something must be said of a serious and rather complex problem which section 198 has created. By virtue of the section, ' all persons ' are deemed to have actual notice of a duly registered charge. Accordingly, if one contracts to buy Blackacre, and there is already some charge registered against it, one is deemed to have known of that charge even before one contracted to buy. Does this mean that one cannot say to the vendor, on discovering that this charge exists, ' A contract of sale which says nothing to the contrary binds the vendor to show a good title, free from incumbrances : this you have not done, for I now discover that Blackacre is bound by a registered charge : I am therefore entitled to withdraw from my contract '? In other words, does the fictitious knowledge which section 198 attributes to a prospective purchaser bind him to take an encumbered title?

The old cases seem to show that a buyer who, when he contracts to buy, knows that the vendor's title is defective can nevertheless withdraw from the contract if the vendor can remove the defect but does not, or if, though the known defect is irremovable, the contract specifically requires the vendor to show a good title.[19] But if one buys under a mere *open* contract, knowing of the existence of an irremovable incumbrance, one must accept it. Thus, the fictitious knowledge which section 198 imputes to a prospective purchaser may be very harmful to him. And the only safe solution seems to be that he should either search the register before he definitely contracts to buy, or make sure that the contract expressly requires his vendor to give him a clear title.[20] In some circumstances, however, it is impossible to take these precautions. If, for instance, one buys land at an auction, one buys on terms fixed entirely by the vendor—and so one cannot in practice insist on an express clause for title; moreover, one will not necessarily know, before the fall of the hammer, the names of the vendor and of his predecessors in title—and so, since land charges (other than local land charges) are only registered against the *name* of the estate owner, one will not have been able to make an effective search.

[19] See, *e.g.*, *Williams on Title*, pp. 69–71; Gibson's *Conveyancing* (16th ed.), pp. 65, 92. In *Re Forsey and Hollebone's Contract* [1927] 2 Ch. 379, Eve J. held (probably obiter) that one cannot repudiate for an irremovable defect of which (by s. 198) one is deemed to have had actual notice, even though the contract does specifically require the vendor to sell free from incumbrances. But this decision does not seem consistent with the earlier cases—*e.g.*, *Re Gloag and Miller* (1883) 23 Ch.D. 320.

[20] But see preceding footnote for the dictum in *Re Forsey*.

ILLEGAL CONTRACTS AND LIMITED INTERESTS

C. J. Hamson

The case of *Bowmakers, Ltd.* v. *Barnet Instruments, Ltd.*[1] deserves perhaps more attention than it has received. The judgment, delivered by du Parcq L.J., is *per curiam* and of a strong Court of Appeal.[2] It is a broad and easy-flowing judgment which cites few authorities and states a general rule in general terms without enumerating the exceptions to which it adverts. It accordingly gives rise to not a few difficulties. But it may well be correct on the main points which it appears to decide; and it may prove to be generally helpful in principle, upon the difficult topic of property passing under illegal contracts, if the principle involved can be extracted and stated with particularity.

The facts, as determined in the Court of Appeal, are as follows :—

The defendants (appellants), Barnet Instruments, Ltd., were minded to purchase from a Mr. Smith some machine tools; but instead of the defendants purchasing directly from him, in order to facilitate the financing of the transaction, it was arranged, as is customary, that Bowmakers, Ltd., the plaintiffs, should buy the machines from Smith and let them, upon normal hire purchase terms, to the defendants. Accordingly the plaintiffs, having bought from Smith, entered into three separate hire purchase agreements with the defendants : Nos. 1 and 2 of March and April, 1944, concerned new machine tools, No. 3 of June, 1944, dealt solely with a machine tool which was ' used '. The defendants ' after making some, but by no means all the agreed payments sold for their own advantage and converted to their use, all the machines except that one which was the subject of agreement 2, and this latter they also converted to their own use by refusing to deliver it up to the plaintiffs on demand '.[3]

The plaintiffs in this action sued to recover damages for the said conversion. By way of defence the defendants pleaded that all the hire purchase agreements were tainted with illegality as

[1] [1945] K.B. 65; 114 L.J.K.B. 41. In the *Law Journal Reports* the defendant is named *Barnett Instruments, Ltd.*
[2] Scott and du Parcq L.JJ., and Uthwatt J.
[3] [1945] K.B. at p. 66.

having directly or indirectly infringed, so far as concerned the new machine tools S.R.O., 1940, No. 1784, and so far as concerned the used machine tool S.R.O., 1940, No. 1374, being orders lawfully made by the Ministry of Supply for the regulation of transactions concerning machine tools.

In the court of first instance Croom-Johnson J. held that no illegality had been proved in respect of any of the hiring agreements, and so avoided the decision of a difficult point. Upon appeal the learned judge's reasoning did not appear convincing to the court and it was assumed 'in favour of the defendants that the three hiring agreements were all, as they allege and for the reasons which they give, affected by illegality'.[4] In spite of this assumption it was held that the plaintiffs were entitled to damages for the conversion, as claimed, in respect of all the machines.

It is evident that the property in the machines passed from Smith to the plaintiffs, whether or not the transactions between *those* parties were illegal. It is also evident that *but for the defence of illegality* there was no answer to the plaintiffs' claim against the defendants for conversion. That is to say, if the hire purchase contracts had been lawful, the defendants' acts evidently amounted to acts of conversion. Where the contract of bailment is a lawful one, there is no difficulty in the plaintiff (the owner) giving evidence of the terms of that bailment in order to show that the defendant's (the bailee's) act transgresses those terms and so, in the appropriate circumstances, constitutes a conversion. But is there not difficulty if the bailment is an unlawful one? Can the plaintiff (the owner) always give evidence of the terms of the unlawful bailment, in the same way as he can of a lawful bailment, in order to show that the defendant (the bailee) by transgressing those terms has committed an act of conversion? Or is the bailee who sets up the bailment driven to prove the punctual *performance* of his obligations thereunder, even if illegal, should he wish to avoid an action for conversion brought by the owner? And will or should the court permit the plaintiff owner to put the defendant bailee to proof of the punctual performance of an unlawful bailment, upon pain of damages in tort if he does not prove that performance?

[4] [1945] K.B. at p. 69. See also at p. 68: 'It is right to add that neither the plaintiffs nor the defendants had any knowledge of the order, so that, if they erred, their error was involuntary, but this, the defendants say, is immaterial. The defendants obtained possession of the machinery as the result of a bargain to procure the commission of a criminal offence, and hence, it was said, they and the plaintiffs, however venial their offence, had been engaged in nothing less than a criminal conspiracy'.

The court disposes of these, the fundamental questions in our case, in a somewhat cavalier manner. The judgment says absolutely 'They (*sc.* the defendants) do not and cannot pretend to have had any legal right to possession of the goods at the date of the conversion'.[5] This is remarkable. The court has held, and rightly, that the illegal sale by Smith to the plaintiffs vested the general property of the goods in the plaintiffs. But if the sale was, despite its illegality, effective to vest the general property in the plaintiffs, the bailment by the plaintiffs to the defendants under the illegal hire purchase agreements was and must have been equally effective to vest the special property in the defendants. Indeed it is trite law that a bailment, whether or not illegal,[6] is in this manner effective to vest the special property and the possession in the bailee. What the court meant, no doubt, is that the defendants acted in breach of the terms of the bailment and that, if the bailment had been lawful, the plaintiffs would have been remitted to an immediate right of possession sufficient to found an action for conversion. But that is merely to leave at large, or to decide without reason, the very point at issue between the parties—namely, whether the illegality of the bailment was or was not at all relevant.

The court is at pains to state[7] that, in its opinion 'so far as their (the plaintiffs') claim in conversion is concerned they are not relying on the hiring agreements at all. . . . They simply say that their machines were their property and this we think cannot be denied'. Prima facie, this comes very close to accepting the attractive argument of Herschell who appeared as counsel for the plaintiff in *Taylor* v. *Chester*[8]—the case where the plaintiff sued, inter alia in detinue, to recover half of a £50 bank note deposited by him with the defendant, a brothel-keeper, to secure payment to her of the price of food and drink supplied by her for a debauch upon her premises. Indeed at p. 311 Herschell stated plainly 'The plaintiff does not claim to succeed upon any contract but on his right of property in the half-note. . . . Here it is the defendant who by means of an immoral contract seeks to detain the note deposited'. That argument was rejected by the court in *Taylor* v. *Chester*.[8] It is interesting to observe how the court in *Bowmakers' Case* distinguishes that case. 'The decision there (*sc.* in *Taylor* v. *Chester*[9]) was, however, entirely consonant with the view

[5] [1945] K.B. at p. 70.
[6] *Scarfe* v. *Morgan* (1838) 4 M. & W. 270, 281, *per* Parke B.; *Taylor* v. *Chester* (1869) L.R. 4 Q.B. 309—both of which cases are cited in the judgment.
[7] [1945] K.B., pp. 69–70.
[8] (1869) L.R. 4 Q.B. 309.
[9] (1869) L.R. 4 Q.B. 309.

we have expressed. It differed from the present case in one essential respect, since in that case the defendant had prima facie a *right to possession* of the half-note which the plaintiff claimed. She was holding it as a pledge to secure the payment of money which *remained due* '.[10]

From this method of distinction it appears that the court in *Bowmakers' Case* was prepared to decide what the court in *Taylor* v. *Chester* expressly refused [11] to decide—namely that the tender or payment of the amount ' due ' would have defeated the defendants' ' right to possession ' and consequently enabled the plaintiff to succeed. Does this mean that the court in *Bowmakers' Case* accepts the general proposition that in case even of an illegal bailment it will inquire into the terms of the bailment as if the bailment had been lawful to discover whether or not the bailee is entitled to retain the chattel?

The formal proposition of the court in *Bowmakers' Case* is in the following words [12] :—

' In our opinion a man's right to possess his own chattels will as a general rule be enforced against one who, without any claim of right, is detaining them, or has converted them to his own use, even though it may appear either from the pleadings, or in the course of trial, that the chattels in question came into the defendants' possession by reason of an illegal contract between himself and the plaintiff, provided that the plaintiff does not seek, and is not forced, either to found his claim on the illegal contract or to plead its illegality in order to support his claim '.

From the proviso it appears that in *Bowmakers' Case* the court is raising a further and exceedingly nice point—namely, when must the bailor who is suing the bailee in tort be said to be relying upon the contract of bailment and when is he relying merely upon his property? [13] At any rate it is apparently decided that the plaintiffs in *Bowmakers' Case* are not relying or founding their claim upon the illegal hire purchase agreements. But though the court purports to except cases where the plaintiff founds his claim on the illegal contract, it expressly states (p. 71) that ' no technical meaning must be ascribed to the words " founded on an illegal contract " ' and it draws no distinction between the various acts of conversion

[10] [1945] K.B. at p. 71—my italics.
[11] (1869) L.R. 4 Q.B. 309, 315.
[12] [1945] K.B. at p. 71.
[13] Perhaps a similar point arises in case of bailments which are not binding upon infants. The courts distinguish with much acuity situations where the bailor brings, and is entitled to bring, an independent action in tort from those in which he is driven to rely upon the contract and so fails. See the instructive case of *Ballett* v. *Mingay* [1943] K.B. 281. Is a similar distinction to be imported into illegal bailments?

actually alleged in *Bowmakers' Case*. They were however very different. The machines under agreements 1 and 3 had been sold by the defendants; but in respect of the machine under agreement 2 the substantial basis of the plaintiffs' claim was the mere failure of the defendants to pay the instalments due. It was only upon that failure to pay that the plaintiffs were entitled to demand, and did demand, the return of the machine. Now it is certain that the plaintiffs were not entitled by action upon the bailment to enforce that payment as such.[14] Is it really quite evident that they should be allowed, by framing their action in tort, effectively to compel the defendants (and others in like case) to the very performance of the illegal contract, so far at least as payment goes? If this is indeed the law, then we must resign ourselves to the edifying spectacle of black marketeers enjoying the protection of the courts in every case where they have had the good sense to dispose of their goods upon hire purchase terms, though of course they would be driven with contumely from the seat of judgment if they have been ill-advised enough to sell upon other terms of credit. It is perhaps remarkable that the same court should have declared, *ore rotundo*, that it disregarded all tricks of pleading and all nice distinctions in order to deal in a large manner with the substance of the matter.

We are not primarily concerned to consider whether this judgment is to be commended or not; we venture merely upon the much humbler task of seeking to discover what the judgment must be taken to have decided. It is evident from the way in which the court dealt with *Taylor* v. *Chester*[14a] that it did not intend to overrule that decision; and accordingly the law still is that the delivery of a chattel under an illegal bailment gives to the bailee a limited interest good against the bailor. The bailor cannot recover his chattel upon proof merely that he was the original owner and that the bailment was for an illegal purpose. It is also clear that the court intended to decide, and did decide, and must be taken to have decided, that where the bailee even under an illegal bailment has travelled entirely outside the scope of the bailment he is liable to an action for conversion at the suit of the original owner. Where for example the bailment is for a fixed term and the bailee sells, even if the bailment is illegal, the bailor may recover in conversion. No doubt under a hire purchase transaction there is an ultimate purpose of transferring to the bailee the general property of the chattel; and a difference might be taken, as indeed

[14] *Pearce* v. *Brooks* (1866) L.R. 1 Ex. 213.
[14a] (1869) L.R. 4 Q.B. 309.

it is in the case of larceny,[15] between a bailee who has conditionally a right to obtain the general property and one who has not. Nevertheless, the bailee who sells during the subsistence of a hire purchase transaction can, without any great extension of the principle, be treated as the bailee who sells under a bailment for a fixed term. And the court intended so to assimilate such bailees, as is evident from the illustration taken [16] by the court from *Pearce* v. *Brooks* [17] which was a case of an abortive hire purchase.

The more important question is whether we should treat as material or as immaterial the fact that in the case of agreement No. 2 the wrongful act of which the plaintiffs complained was not the sale by the bailee but his mere retention of the goods during the term of the bailment without payment of the agreed hire. The court did not differentiate between the defendants' various acts in respect of the different machines. Are we to say that judging from the instance given we must suppose that the court was directing its mind only to a case where the bailee's act is similar to that of selling during the term; and did not intend to decide a case where, the bailment being, say, for three months at a monthly rate of hire, the bailee merely refuses to deliver on a demand made at the end of the first month, after having failed to pay that month's hire? For surely the cases are somewhat different; and in the second instance the court is coming very near to doing what it *said* it would not do, namely, enforcing under cover of an action in tort the terms of the illegal bailment. Or should we say, what would perhaps be more respectful, that the court must be taken to have adverted to the difference between the acts of conversion under agreements 1 and 3 and agreement 2 and to have decided that that difference is immaterial, however difficult the conclusion may appear to us to be?

If this second alternative is taken then the court does seem to have accepted the general proposition—namely, that even where a bailment is illegal, it is a condition of the subsistence of the bailment that the terms of the bailment are actually performed by the bailee and that upon non-performance of those terms the bailor is entitled to prove the determination of the bailment and to reclaim possession of the chattel.[18] We shall see that this proposition has interesting results in the disputed case of illegal leases if its scope can include leases also.

[15] See, *e.g.*, the classical statement by Scrutton L.J. in *Folkes* v. *King* [1923] 1 K.B. 282, pp. 306–8.
[16] [1945] K.B. at p. 70.
[17] (1866) L.R. 1 Ex. 213.
[18] Note that perhaps Martin B. might have accepted this view. See *Pearce* v. *Brooks* (1866) 1 Ex. 213, 217. But he was speaking extempore during argument, and the ground he suggests is queer indeed.

Nevertheless, before passing to that matter, we should observe that some limits must be set upon the generality of the proposition, and in particular those arising from the court's own proviso.[19] In some cases at least the plaintiff bailor will be held to be founding his claim upon the illegal contract; and in such unspecified cases he will fail. We must at least distinguish between kinds of illegality. For example, if it is not merely the surrounding circumstances of the bailment as in *Pearce* v. *Brooks*[20] itself, nor its mere making, as in *Bowmakers' Case*, which render the bailment illegal, but if the terms of the bailment themselves require the commission of a further illegal or immoral act by the bailee—for example, if the alluring brougham in *Pearce* v. *Brooks*[20] were hired to the lady at a monthly hire for a period of six months upon condition that she used it for immoral purposes—it is clear that even the *Bowmakers* court would not permit the bailor to recover the brougham or sue for its conversion upon proof that the lady had not used it for those purposes : even if it is to be admitted, what was at least doubtful before *Bowmakers' Case*, that the bailor would now be entitled to recover the brougham during the six months upon non-payment of the hire.

The student should also be warned that cases on illegality are infinitely various and that it is exceedingly dangerous to take upon its face value in these matters even the ratio decidendi of the strongest court. It is particularly important in *Bowmakers' Case* to note that it was a ministerial order which was being infringed, that the infringement of that order caused the court no appreciable moral indignation and indeed what seemed to have moved the court was their sense of the unconscientiousness of the defendants' behaviour in seeking refuge behind the ministerial order. The result might well have been very different if the court had been moved to indignation at the plaintiffs' conduct, as it might have been had the facts similar to those of *Taylor* v. *Chester*[21] been before it.

Limiting the proposition (whatever may be the other appropriate limits) to the facts arising under agreement 2 in *Bowmakers' Case* : that is to a situation, where the bailment though in itself illegal, does not require as a condition of its subsistence the

[19] The court also noticed (p. 72) 'one obvious exception, namely, that class of cases in which the goods claimed are of such a kind that it would be unlawful to deal in them at all, as for example, obscene books'. Perhaps this exception would prevent the fence recovering from the burglar upon his failure to meet an instalment the value of housebreaking tools bailed to him upon hire purchase terms; which value, but for this exception, would have been recoverable upon the principles of this case.

[20] (1866) L.R. 1 Ex. 213.

[21] (1869) L.R. 4 Q.B. 309.

commission of any further illegal act by the bailee but the bailee has infringed the terms of the bailment by neglecting to pay the hire reserved—we may ask whether a similar principle should, since *Bowmakers' Case*, be applied to illegal leases. Facts parallel to those in *Bowmakers' Case*, and equally unlikely to arouse moral indignation, may be found in *The Gas Light & Coke Co.* v. *Turner*.[22] There the plaintiffs granted a lease under seal to the defendants for twenty-one years of premises in London. There was nothing ex facie illegal in the lease. It was however the common intent of the parties that the defendants should use the premises for the purpose of drawing oil of tar or pitch contrary to 25 Geo. 3, c. 77, which prohibited such user. The declaration set out the lease, the covenant to pay rent and a breach by non-payment. By way of plea, the defendant alleged the illegality of the lease by reason of the common intent of the parties as to the user. The plaintiff demurred and was joined in the demurrer. Parol evidence being admitted as to the user, judgment was for the defendant.

So far as the court there held that rent reserved under an illegal lease cannot be recovered by action, the decision has repeatedly been followed [23] and is not here in point. The court however expressly refused [24] to decide the question (which was not before them) whether the plaintiff could recover the premises in ejectment from the defendant upon breach of the condition in the lease to pay rent. That admirable book on Contract, *Cheshire and Fifoot*, is of opinion that the landlord would not succeed in ejectment, saying [25] 'A tenant for instance who enters into occupation of premises under a long lease made to him for some unlawful purpose acquires as we have seen legal possession. It would therefore seem to follow that he is entitled to retain this possession for the whole of the term without payment of rent. . . .' The learned authors refer to *Alexander* v. *Rayson*,[26] as indeed they are entitled to, though Romer L.J.'s statement there is slightly qualified, he saying 'The defendant would be entitled to remain in possession of the flat without payment of rent until and unless the plaintiff could eject her without having to rely upon the lease or agreement'. It is, however, evident from what he says on the next page that Romer L.J. supposed that the landlord would not

[22] In C.P. (1839) 5 Bing.N.C. 666; in Exch.Ch. (1840) 6 Bing.N.C. 324.
[23] One of the more recent decisions is *Alexander* v. *Rayson* [1936] 1 K.B. 169 (C.A.) which reviews most of the relevant cases.
[24] *Per* Parke B. (1840) 6 Bing.N.C. 324, 329. In the *Common Pleas*, Tindal C.J. (5 Bing.N.C. 666, 677–8) seems to suggest that ejectment might have succeeded.
[25] Pp. 247–8.
[26] [1936] 1 K.B. 169, pp. 186–7.

during the continuance of the term have been able to bring ejectment for non-payment of rent without relying upon the lease which made such non-payment a condition of the cesser of the term.

Admittedly there is a difference between a lease and a bailment; but surely it would be very odd to hold that a lessor suing in ejectment for non-payment of the rent reserved was relying upon his illegal contract and therefore failed, but that a bailor suing (upon the non-payment of the hire reserved) to recover a chattel in which the bailee had a special property was not relying upon the illegal contract and therefore succeeded. To reach such a result, we would have to examine the nicest technicalities of pleading, and so do what the court in *Bowmakers' Case* categorically said should not be done in a case of illegality. No doubt even where a rent is reserved the subsistence of the term of years is not by law conditional upon the payment of the rent and an express condition of cesser must be proved, so that technically perhaps the landlord must give evidence of the terms of the illegal lease to prove the cesser. Yet, even if the lease is under seal, the cesser clause will be contained in the document which the tenant will produce to prove the existence of the lease, the burden of proof being upon him [27] when the landlord has shown *liberum tenementum* in himself. Therefore the very reading of the document which the tenant must set up will show the determination of the term he claims, or at least the landlord's right of entry : which being exercisable over or in respect of a legal term of years absolute is an interest in land capable of subsisting at law [28] and therefore not merely a contractual right in personam. It would not therefore seem that the landlord suing in ejectment is driven to rely upon the illegal contract, or at any rate not more than the bailor who has bailed the chattel for a fixed period or upon hire purchase terms. It is true that the term of years vested in the tenant is a legal estate and does not cease merely by the non-payment of rent even in a lease containing a condition of cesser upon that event; yet it seems equally true that the bailee obtains by delivery a special property in the chattel which, if *Taylor* v. *Chester* [29] is correctly decided, is distinct from and independent of the contract of bailment. The substance of the matter surely is that both the tenant and the bailee have obtained a limited interest and that the interest is so limited that the bailor's right to possession and the lessor's right of entry equally come into existence upon the non-payment of the rent or hire reserved. If the substance of

[27] *Delaney* v. *T. P. Smith, Ltd.* [1946] K.B. 393.
[28] Law of Property Act, 1925, s. 1 (2).
[29] (1869) L.R. 4 Q.B. 309.

the matter is to be regarded surely the same rule should be applied to both, more particularly since the only relevant point at issue is merely whether the claim of either is founded on the illegal contract.[30]

The student, however, should bear in mind that the balance of authority seemed, previous to *Bowmakers' Case*, to be against permitting the lessor to recover in ejectment for non-payment of rent during the whole period of the term if the lease were illegal. And there is something not unattractive in the suggestion that the lessor, having granted the term of years, should lose the whole benefit of his lease during that term because of the illegality. But if the suggestion is attractive, it is, pro tanto, an argument against permitting the bailor also to recover his chattel simply upon the non-payment by the bailee of the hire reserved by the illegal bailment.

The student is also warned to avoid, at least in examinations where accuracy is necessary, the habit, not unknown to reputable textbooks[31] and to judges, of speaking of all illegal leases indifferently as void. A lease, which is illegal by reason merely of its ulterior purpose at any rate, is certainly as effective as a legal lease, if executed under seal, to vest in the tenant a term of years.[32] What seems to be meant by the term 'void' at least in some cases is simply that neither the lessor nor the lessee can sue the other personally on the executory covenants.

CONCLUSIONS

The question in *Bowmakers' Case* is: 'when can a bailor recover from the bailee under an illegal bailment the chattel bailed or its value?' The simplest answer would no doubt have been to treat an illegal bailment as a bailment at will and to permit the bailor always to recover the chattel upon mere demand. This answer had however been rejected in *Taylor* v. *Chester*[33] despite Herschell's argument; and the court in *Bowmaker's Case* accepts that decision as correct. The bailee accordingly still acquires, by virtue of the illegal bailment, some interest or property in the chattel other than one defeasible merely on demand. In *Bowmaker's Case*, however, the court goes on to hold that the bailor can recover the chattel bailed under an illegal hire purchase contract even though the only wrongful act by the bailee, in one of the instances, was his mere

[30] Where a lease under seal has not been executed and the tenant holds under an agreement in writing for a lease it seems even more evident that the tenant must be assimilated to the bailee.

[31] See, *e.g.*, Woodfall, *Landlord and Tenant* (24th ed.), pp. 253, 595.

[32] See, *e.g.*, *Pollock on Contract* (12th ed.), pp. 335–6.

[33] (1869) L.R. 4 Q.B. 309.

continuance in possession after demand made for the return of the chattel upon his failure to pay some instalments of the hire reserved by the bailment. Those instalments could not, by reason of the illegality, be recovered directly by action against the bailee. The difficulty is that the court, while declaring, as indeed it was bound to, that ' no claim founded on an illegal contract will be enforced ' and that ' no technical meaning must be ascribed to the words " founded on an illegal contract " ', nevertheless appears to come very close, under cover of an action in tort, to enforcing the terms of the illegal bailment against the defendants.

It is suggested that, despite the court's laudable desire to avoid technicalities, the question who is to keep a chattel which has been the subject of an illegal contract will continue to be decided with the aid of very abstruse technicalities; that the established principle that delivery or conveyance under an illegal contract effects a valid transfer of property or of an interest in property is itself no mean technicality and forms the basis of rules which are therefore likely to have a technical bias; and that in *Bowmakers' Case* perhaps the court applied the technicalities with less consideration than they merited, and with results which both to the technician and to the layman are somewhat startling.

It is further suggested that, if *Bowmakers' Case* is rightly decided, there is now no objection to the lessor also recovering possession of premises demised under an illegal lease upon non-payment of the rent reserved, even if the lease has been executed under seal, provided it contain the normal provision for determination upon non-payment. Before *Bowmakers' Case* the balance of authority was against such a recovery during the period of the term.

NOTES ON RECENT CASES

ADMINISTRATION—PAYMENTS BY EXECUTORS UNDER MISTAKE OF LAW —LIMITATION ACT, 1939—EQUITABLE DOCTRINE OF TRACING

Re Diplock, Diplock v. *Wintle* [1948] Ch. 465 (C.A.).

THE Court of Appeal have overruled the greater part of the decision of Wynn-Parry J., noted *ante*, pp. 116–119. Executors, acting in good faith upon the terms of a residuary bequest which was invalid in law, had made substantial payments to a number of charities. Thereupon, the testator's next-of-kin challenged the validity of the residuary bequest and the executors sent immediately to each charity a warning letter to that effect. In respect of their own personal liability (for devastavit, etc.) for making the wrongful payments, the executors reached a compromise with the next-of-kin. The next-of-kin now claim that each charity is liable to refund the money it received. The charities admit that the 'warning letter' gave them notice of the invalidity of the residuary bequest. Before it reached them, however, some of the charities had spent or had mixed with other moneys the sums they had so received.

The judgment of the Court of Appeal, delivered by Lord Greene M.R., falls into three sections: (1) the personal liability in equity to refund; (2) the question whether some of the claims were statute-barred; (3) the equitable doctrine of tracing.

(1) The executors paid the charities under a mistake of law: accordingly, a common law action brought by the executors against the charities for money had and received would have failed. Equity will not nowadays invent an equitable jurisdiction for a new hard case. But a long series of decisions shows that equity does give relief against creditors or legatees whom executors have overpaid; and there is no hint in the earlier decisions that equity acted only when there had been a mistake of mere fact or only when the court had authorised the erroneous payment. The charities are therefore bound in equity to refund, with two reservations. First, equity does not act where the law gives adequate relief, and here the next-of-kin had a claim at law against the executors: the refund is therefore reduced by the amount recoverable from the executors. Second, the refund does not carry interest. This section of the judgment, be it noted, is confined to mistaken

payments made by personal representatives : it seems inapplicable to mistaken payments made by ordinary trustees.

(2) Some of the charities were paid more than six years (though less than twelve) before the action began. This led to an interesting analysis (pp. 507–516) of the Limitation Act, 1939. Shortly, the decision was that the period applicable is twelve years (section 20—' any claim to the personal estate of a deceased person '). Although section 2 (7) of the Act preserves the court's power, when granting equitable relief, to apply the six year period by analogy, this will not be done in a case which is already covered by some other section of the Act.

S. J. B.

(3) The equitable right to trace, where available, is wider than the common law right to follow assets, in that it allows entry into a mixed fund, by means of a declaration of charge thereon.

Wynn-Parry J., relying on *Re Hallett's Estate* (1880) 13 Ch.D. 696, had held that this equitable remedy is available only where a fiduciary relationship exists between plaintiff and defendant. The Court of Appeal has decided that *Hallett's Case* was but one application of a wider principle, the true limits of which are to be found in *Sinclair* v. *Brougham* [1914] A.C. 398. That principle may be stated thus :—

> A person whose money has been mixed may trace into the mixed fund, although it is in the hands of, and has been mixed by, an innocent volunteer, provided that (i) there was originally such a fiduciary relationship between the claimant and the person who made an unauthorised disposition of his money as to give the claimant an equitable proprietary interest, (ii) the money is still fairly identifiable, and (iii) a declaration of charge would not be unjust.

Proviso (i) is essential, because equitable tracing asserts an equitable proprietary interest. Proviso (ii) is necessary, because equity only intervenes to prevent a defendant from acting in an unconscionable manner. It is not unconscionable for a defendant, although he be a volunteer, who received and mixed money without notice of the plaintiff's interest, to assert a claim of his own in the mixed fund : in such a case, accordingly, there is no priority as between the claims of plaintiff and defendant. In connection with this proviso, the discussion of the common law right to follow assets and of the meaning of ' money ' (pp. 518–523) are of great interest. Proviso (iii) proceeds from the broad principle that equitable relief should not work injustice.

In the present case, the necessary fiduciary relationship existed between the plaintiffs and the *executors* who made the unauthorised payments (the word ' recipient ' in the headnote—line 7 of p. 467

—is misleading in this respect). Accordingly, the claimants had an equitable right of property in the money, which, within the limits of the principle stated above, they could follow into the assets of the charities. The detailed application of the principle to the various sets of facts may be found towards the end of the judgment (pp. 545 *et seq.*).

This statement by the Court of Appeal of the scope of the right to trace in equity gives considerable support to that school of thought which regards equitable rights as rights *in rem*. It is necessary, of course, to ascertain in each case whether the relationship asserted is of such a fiduciary nature as to give the plaintiff an equitable right of property, for the court explicitly rejected the broad view, apparently favoured by Lord Dunedin in *Sinclair* v. *Brougham*, that equitable tracing would provide a remedy in every case of unjustified enrichment. Bona fide purchase for value without notice is a complete defence to a claim to trace in equity.

The finding that mere receipt of the money did not constitute the charities constructive trustees for the plaintiffs supports the view expressed by a former contributor to this *Journal* (*ante*, pp. 118–119). Notice to the defendant of the plaintiff's interest is, for present purposes, relevant in determining not the plaintiff's right to recover but the extent to which he may recover : if the defendant be an innocent volunteer, as were the charities in the present case, the plaintiff's claim ranks *pari passu* with the defendant's, *i.e.*, he may recover only to the extent to which his money is still represented in the mixed fund.

J. A. C. T.

CONFLICT OF LAWS—BAILMENT—PROPER LAW—LEX LOCI SOLUTIONIS—ILLEGALITY—FOREIGN EXCHANGE LAW
BAILMENT—ACTION IN REM—CONSENT OF BAILOR

(a) *Frankman* v. *Prague Credit Bank* [1949] 1 K.B. 199 (C.A.).
(b) *Kahler* v. *Midland Bank, Ltd.* [1948] 1 All E.R. 811 (C.A.).

(a) In the first case the plaintiff, a Czech refugee, had become entitled in 1935 to certain bonds which had been bought by the defendants in Prague through their London office. The bonds remained in London and the plaintiff assented to this arrangement. In 1946 she sought to recover the bonds. The London office did not dispute her ownership, but it pleaded the necessity for permission from the Prague head office which the Czechoslovakian exchange laws in fact prevented it from giving. The question turned upon the construction of the defendants' Conditions of

Business. Cassels J. held that the *locus solutionis* was Prague, and that therefore the principle of *Ralli Brothers* v. *Compania Naviera Sota y Aznar* [1920] 2 K.B. 287, applied. The Court of Appeal, however, held that English law was intended to govern, and that therefore the Czechoslovakian law could have no effect upon the relationship of the parties; furthermore the *locus solutionis* was England.

(b) In *Kahler's Case*, an earlier decision of the same court, the plaintiff, again a Czech refugee, was admittedly owner of certain bonds held by the defendants in London to the order of the B. Bank in Czechoslovakia, with which the plaintiff had an account. The defendants declined to deliver the bonds as the B. Bank only was their customer. The plaintiff claimed in contract and *in rem*. The defendants were upheld on both grounds.

In *Frankman's Case* English law alone was found to govern the contract of deposit *ab initio*; in *Kahler's Case* Czechoslovakian law ruled, but the result might nevertheless have been avoided. Although it was found that the B. Bank did not contract as agent for the plaintiff as an undisclosed principal, there was a bailment. On principle therefore the defendants should have had no answer to a claim by the true owner. The court, however, held that he had no right to *possession* without the permission of the B. Bank, the granting of which the Czechoslovakian exchange laws precluded. The result was to enforce in England a foreign exchange law against two 'exchange foreigners' to whom it did not purport to extend. Cf., *e.g.*, *Re Visser* [1928] 1 Ch. 877.

The application of the Bretton Woods Agreement Act, 1945, was discussed in *Kahler's Case*, but without directly affecting the decision.

E. H. D.

CONFLICT OF LAWS—NULLITY—JURISDICTION—MARRIAGE VOID OR VOIDABLE—PROPER LAW

De Reneville v. *De Reneville* [1948] P. 100 (C.A.).

The petitioner married a domiciled Frenchman in Paris in 1935 living with him in France until 1940 when she left him and returned to England. She petitioned for a decree of nullity alleging his incapacity or wilful refusal to consummate. The Court of Appeal, following *Inverclyde* v. *Inverclyde* [1931] P. 29, in stressing the difference between void and voidable marriages, decided that because her domicile must be French, it had no jurisdiction. In a

voidable marriage domicile founds jurisdiction, but not the petitioner's residence (overruling *Robert* v. *Robert* [1947] P. 164), nor (*per* Lord Greene) the respondent's silence. Whether the residence of both parties (cf. *Hutter* v. *Hutter* [1944] P. 95; *Inverclyde's Case*, *supra*), or celebration in England, or hardship suffices was expressly left open.

Thus, jurisdiction depended on domicile, which in turn depended upon whether the marriage was void or voidable; in the last question reference had to be made to the 'proper' law. The court chose French law, because it was the law of the 'intended matrimonial domicile' (citing only *Brook* v. *Brook* (1861) 9 H.L.C. 193)—or, less probably, the husband's domicile (whether at the time of marriage or the petition is not clear)—to govern this matter of 'essential validity'. If French law found the marriage void (in the English sense) on any ground, the English court was competent. However, as French law was presumed to correspond to English, by which the marriage could not possibly be void but only at most voidable, the wife shared her husband's French domicile, and the court lacked jurisdiction.

It is perhaps unfortunate that the court did not expressly favour domicile as the exclusive foundation of jurisdiction over voidable marriages, as it is in divorce. As for the law applicable, capacity still depends on the pre-marital domicile (*Sottomayor* v. *de Barros* (1877) L.R. 3 P.D. 1), and form upon the *lex loci celebrationis* (*Scrimshire's Case* (1752) 2 Hag.Con. 395). However, 'essential validity' (an ill-defined category) is governed by the (unhappily ambiguous) 'law of the intended matrimonial domicile'. One wonders whether a recurrence of the facts of *Hutter's Case* (*supra*) or *Easterbrook* v. *Easterbrook* [1944] P. 10, would bring such a complacent (though surely sensible) application of the *lex fori* after this piece of judicial legislation.

K. W. W.

CONTRACT—C.I.F. CONTRACT—PROVISION FOR TENDER OF DELIVERY ORDER INSTEAD OF BILL OF LADING—DELIVERY OF GOODS PREVENTED BY WAR—FAILURE OF CONSIDERATION—CLAIM FOR REFUND OF PRICE

Comptoir d'Achat, etc. v. *Luis de Ridder* [1949] 1 All E.R. 269 (H.L.).

The decision of the Court of Appeal in this case, noted *ante*, p. 107, has been reversed unanimously by the House of Lords. Their Lordships have held that the contract, despite its words 'c.i.f. Antwerp', was in substance a contract to deliver at Antwerp, not

a true c.i.f. contract. Accordingly, neither property nor possession had passed to the buyer, when, the goods being still at sea, Antwerp was occupied by the German forces. There was consequently a frustration of the adventure and a total failure of the consideration in respect of which the buyers had paid (against delivery order addressed to sellers' cargo agents at Antwerp) the price of the goods in advance of delivery.

S. J. B.

CONTRACT—GAMING DEBT—FRESH PROMISE TO PAY

Bob Guiness, Ltd. v. *Salomonsen* [1948] 2 K.B. 42.

The plaintiff bookmaker was owed a betting debt by S. and, in order to induce payment, threatened to declare him a defaulter. After requesting the bookmaker not to carry out his threat, the defendant made a fresh promise in writing to pay. The plaintiff, basing his claim on this promise, sued to recover the debt. It was held by Denning J. (as he then was), distinguishing *Hyams* v. *Stuart King* [1908] 2 K.B. 696, that the promise was not binding because it was unsupported by any consideration. There was no promise, express or implied, by the bookmaker not to report the defendant and the learned judge decided that actual forbearance, without such a promise, was not real consideration.

In reaching this decision, Denning J. did not advert to the principle that performance of an act at the request of another person may amount to executed consideration (*Carlill* v. *Carbolic Smoke Ball Co.* [1893] 1 Q.B. 256). *Alliance Bank, Ltd.* v. *Broom* (1864) 2 Dr. & Sm. 289, seems to be authority for equating an act and a forbearance in this respect, but the learned judge considered that case to be an exception to the doctrine of consideration. In his opinion 'promises are enforced when they are intended to be legally binding, intended to be acted upon and are in fact acted upon, even though it may be difficult in legal theory to find any real consideration for them'. Although S.'s promise might seem to fall within this category, it was held as a fact that the parties did not intend to alter their existing legal relations.

The above statement of law, first formulated by Denning J. in *Central London Property Trust, Ltd.* v. *High Trees House, Ltd.* [1947] K.B. 130, and applied in the recent case of *Robertson* v. *Minister of Pensions* [1948] 2 All E.R. 767, is a startling inroad into the strict doctrine of consideration. A series of cases, apparently concerned with estoppel, was adduced as authority for this new rule of substantive law and, in the opinion of the learned

judge, the development was ' a natural result of the fusion of law and equity '. The principle is one which accords with good sense, but it may perhaps be thought that such a modification of the classic common law rules of contract might be better implemented by legislative action.

(Note : The House of Lords is to review *Hyams' Case* in the near future. See *William Hill, Ltd.* v. *Rose* [1948] 2 All E.R. 1107, Editorial Note.)

M. H.

CONTRACT—MISTAKEN IDENTITY—AUCTION SALE

Dennant v. *Skinner & Collom* [1948] 2 K.B. 164.

At an auction, a car was knocked down to K. He desired to pay by cheque, saying he was ' King ', of King's Motors, a reputable firm. He later bought other cars, including the one in dispute. Because of his lies, his cheque was accepted, with a written declaration by him that the ownership in the cars was not to pass until his cheque was honoured. It was never honoured, and King sold the car to S. The auctioneer sued S. for the car or its value.

Hallett J. held that in an auction, the buyer's identity is not usually relevant for the purposes of the contract of sale; that, in such a contract, the property in the goods passes on the fall of the hammer, subject to contrary intention (see Sale of Goods Act, 1893, s. 18); and that, accordingly, since the document signed by K. was irrelevant to the transaction, the ' purchaser ' could pass a good title, and the plaintiff's claim failed.

It has been suggested that, in contracts of sale, there can be no operative mistake as to identity inter praesentes, and Professor Brierly in Anson, *Law of Contracts* (19th ed.), pp. 157–8, said, ' That would be a startling conclusion, and it is difficult not to believe that in *Phillips* v. *Brooks* the shopkeeper never intended to contract with North, but with Sir George Bullough and no one else '. However, in *Phillips* v. *Brooks, Ltd.* [1919] 2 K.B. 243, Horridge J. found that the jeweller did intend to contract with North, and said at p. 246—his remarks were later approved in *Lake* v. *Simmons* [1927] A.C. 487—' He in fact contracted to sell . . . to the person who came into his shop '. The misrepresentations were made after the contract was formed, as in *Dennant* v. *Skinner*, which in this respect is on all fours with *Phillips* v. *Brooks*. At the time the disputed car was sold to him, K. had indeed already made fraudulent misrepresentations, but ' In the present case . . . there was no mistake as to the . . . parties at the time the contract

was made ' (p. 171). The basis of both decisions seems to be this, that the mistake affected only the purchaser's trustworthiness.

This does not mean that mistaken identity can never—inter praesentes—prevent the formation of the contract. *Hardman* v. *Booth* (1863) 1 H. & C. 803, is in point, and in *London Jewellers, Ltd.* v. *Attenborough* [1934] 2 K.B., at p. 217, Scrutton L.J. said : ' In such a case, different questions may arise . . . and the point may have to be considered at some future time '.

A. A. L. A.

CRIMINAL LAW—LARCENY—WHAT CONSTITUTES SUFFICIENT POSSESSION TO MAKE A THING CAPABLE OF BEING STOLEN

Hibbert v. *McKiernan* [1948] 2 K.B. 142.

Hibbert, while trespassing on the private links of a golf club, took and carried away eight golf balls lost and abandoned by their owners. When arrested, he gave a false name and said that he knew he had no right to take the balls. He was charged with larceny from the golf club.

The Divisional Court of the King's Bench held (i) that since the golf club intended to exclude trespassers it had sufficient possession of things abandoned on its land to support a charge of larceny if the things were taken with felonious intent, and (ii) that Hibbert had such a felonious intent, and was therefore guilty of larceny.

The court had to decide whether knowledge of the existence of a thing is always necessary for the possession of it. In an answer nicely restricted to the case before them, they found that *for the purpose of larceny* knowledge may not be necessary, provided the thing is (i) taken with felonious intent, and (ii) (*per* Pritchard J.) from a place where the landowner not only has the implied intent of all landowners to exclude wrongdoers, but actually manifests his intention to do so.

Both conditions were present here. Hibbert had a thoroughly guilty mind; the golf club had warned him off the links before. Thus, even without knowing of the existence of the balls, the club had sufficient possession of them for larceny.

The court followed *R.* v. *Rowe* (1859) 23 J.P. 117, in which the prisoner was held to have stolen some iron from the bed of a canal where it had fallen from a barge, though the canal company were ignorant of its existence.

Lord Goddard C.J. said that it would be an entirely different problem if the balls had been taken honestly. The question then

would be one of the better right to possession as between finder and occupier of the land—the *Bridges* v. *Hawkesworth* (1851) 21 L.J. Q.B. 75, situation, in fact. The court had no need to set foot in that legal labyrinth, since Hibbert's intention was manifestly dishonest. Moreover, 'any difficulty might have been avoided by describing the balls . . . as the property of persons unknown'.

Jurists who seek a consistent theory of possession will find little comfort in this case. What was decided here, it is suggested, has relevance to larceny and to larceny alone.

D. G. W.

INTERNATIONAL LAW—MANDATE—LEGISLATIVE CAPACITY OF MANDATORY—FREEDOM OF THE SEAS—INTERCEPTION AND DIVERSION OF VESSEL ON THE HIGH SEAS

Naim Molvan v. *Att.-Gen. for Palestine* [1948] A.C. 351.

The vessel *Asya*, flying no flag and carrying seven hundred immigrants, was intercepted by a British warship one hundred miles from Palestine. The vessel hoisted the Turkish flag, then the Zionist flag, and was boarded and escorted to Haifa. On the application of the Attorney-General for Palestine the forfeiture of the vessel was confirmed by the Supreme Court of Palestine under section 12 of the Immigration Ordinance, 1941.

On appeal to the Judicial Committee of the Privy Council the appellant submitted that the seizure of the vessel was contrary to international law. The *Asya* was not a Palestinian ship. The ordinance, issued under delegated powers, must be so construed as not to authorise the seizure on the high seas of such a vessel; otherwise it was ultra vires and invalid.

Their Lordships, however, held that the terms of the ordinance were in no way repugnant to the provisions of the Mandate for Palestine. The ordinance applied not only to Palestinian vessels but to those brought in after capture, and so read it was neither ultra vires nor contrary to international law. The ordinance, even assuming that it authorised the seizure of the *Asya* on the high seas, was not contrary to any rule of international law which was, in the words of Lord Alverstone C.J. in *West Rand Central Gold Mining Co.* v. *R.* [1905] 2 K.B. 391, 'one really accepted as binding between nations'. No such right as 'the freedom of the open sea' had been established unqualified by place or circumstances, and even if so established it was not necessarily applicable to the case of a Mandatory Power, enforcing a policy entrusted to its charge.

Whatever the freedom of the open sea may mean it is a freedom of ships which fly the flag of a State which is within the comity of nations. 'No question of comity nor of any breach of international law can arise if there is no State under whose flag the vessel sails.' Though the offence consisted in an unlawful entry into Palestine its abetment might be an offence by persons outside Palestine and the forfeiture of their property within the jurisdiction was not contrary to international law.

J. O. D.

LEASE—OPTION TO PURCHASE REVERSION NOT REGISTERED AS LAND CHARGE—SALE OF REVERSION—LIABILITY OF LESSOR—MEASURE OF DAMAGES

Wright v. *Dean* [1948] Ch. 686.

In 1937 the defendant Dean granted to Wright certain property for a term of twenty-one years, under a lease which provided that the tenant, at any time after the expiration of the third year of the term, might purchase the reversion in fee simple in the premises for £650 by giving notice in writing to that effect to the lessor.

Under the Land Charges Act, s. 10, this option was capable of registration as a land charge, but it was not so registered. In 1944 the defendant sold the reversion to B.

In 1947 notice was given on behalf of Wright to B, purporting to exercise the option, but B rejected the notice on the ground that the option was not registered and so was void as against him. Wright thereupon sued Dean, the original lessor, for damages for breach of contract.

Wynn-Parry J. held (1) as was conceded by counsel, the burden of the option did not run with the reversion at law, nor, for want of registration, did it bind the assignee in equity; (2) since a lessor who assigns his reversion is not discharged thereby from the burden of a covenant running with the reversion (see *Stuart* v. *Joy* [1904] 1 K.B. 362), a fortiori he is not so discharged from a contract collateral to the lease; (3) at the time the lease was made, it must have been within the contemplation of the parties that, should Wright exercise his option, he would either have the property conveyed to him or have damages representing the loss he would have sustained; accordingly, by virtue of the rule in *Hadley* v. *Baxendale*, he is not confined to nominal damages despite his failure to register his option.

Wright had no remedy at law against B, the purchaser, since the

covenant was not such as would run with the land (see Law of Property Act, 1925, s. 142; *Woodall* v. *Clifton* [1905] 2 Ch. 257). He had no equitable remedy against B since the option was not duly registered as a land charge. But the fact that he failed to register his option did not affect his contractual rights against the original lessor, Dean.

K. T.

TORT—HOMING PIGEONS—RIGHT OF FARMER TO KILL IN DEFENCE OF CROPS—PROPERTY IN PIGEONS

Hamps v. *Darby* [1948] 2 K.B. 311 (C.A.).

When they were let out for exercise some of the plaintiff's racing pigeons spent their hour of freedom feeding on the defendant's pea crop. The defendant, after shouting at them without effect, fetched a gun and fired five shots at them, killing four and wounding one. In a county court action for trespass his defence was (i) that the plaintiff could have no property in homing pigeons; (ii) that the shooting was justified. The judge found for the plaintiff, and, on appeal, the Court of Appeal (Lord Greene M.R., Wrottesley and Evershed L.JJ.) affirmed his decision.

Evershed L.J. declared that the appellant's first submission rested on a note in Croke's report of *Dewell* v. *Sanders*, Cro.Jac. 490; 2 Rolle Rep. 3, where it was stated that the majority of the judges held that 'if pigeons come upon my land I may kill them'. Rolle's Norman-French report shows that this note was, besides being irrelevant to the issue in *Dewell* v. *Sanders*, inaccurate and misleading. The court preferred the opinion of Blackstone and Bracton, who had said that a pigeon which had animum revertendi could be the subject of ownership.

The Court of Appeal further held that the county court judge, in considering the plea of justification, had rightly applied the rules in *Cresswell* v. *Sirl* [1948] 1 K.B. 241, a case that was reported after the hearing of the action but before the judgment. Wrottesley L.J., though disagreeing with the judge's finding of fact, was not prepared to say that it was one to which no reasonable man would have come.

The extension of the rules in *Cresswell* v. *Sirl* to crop damage is welcome; so also is the court's decision that a pigeon fancier has a special property in his roving pigeons. The court held, indeed, that the plaintiff had both property and possession (see pp. 322–323). This adds a new example to the cases where there is legal possession with neither control nor custody.

It is, perhaps, time to consider the effect on the judge of a new decision reported after the hearing of a case but before judgment. There is a case for considering it as fresh evidence, and allowing counsel to argue its relevance.

S. A. C.

TORT—HUSBAND'S ANTE-NUPTIAL TORT—WIFE'S 'THING IN ACTION'—WIFE ENTITLED TO SUE HUSBAND FOR ITS PROTECTION—MARRIED WOMEN'S PROPERTY ACT, 1882, SS. 12, 24

Curtis v. *Wilcox* [1948] 2 K.B. 474 (C.A.).

THE defendant by his negligent driving injured the plaintiff, a passenger in his car. After the issue of her writ, claiming, inter alia, damages for pain and suffering, but before the hearing of the action, the plaintiff married the defendant. The defendant, in substance the husband's insurance company, pleaded that the claim for general damages was barred by the marriage.

Oliver J. held that he was bound by the judgment of McCardie J. in *Gottliffe* v. *Edelston* [1930] 2 K.B. 378, and disallowed the claim for general damages. The Court of Appeal (Scott, Wrottesley L.JJ., Wynn-Parry J.) in a considered judgment *per* Wynn-Parry J., allowed the appeal and overruled *Gottliffe* v. *Edelston*. They agreed with McCardie J.'s view that a thing in action includes a right of action in tort, but they dissented from his decision that 'thing in action' as used to define separate property in the Married Women's Property Act, 1882, s. 24, was used in a limited sense. Accordingly, a wife is now entitled to sue her husband for a purely personal ante-nuptial tort.

An incautious reading of this case, particularly the reference to *Chant* v. *Read* [1939] 2 K.B. 346 (which concerned a post-nuptial tort), and the obscure last paragraph of the judgment, might suggest that a wife can now also sue her husband for a personal injury committed after marriage. It is submitted that such an interpretation of *Curtis* v. *Wilcox* would be mistaken. If the tort is ante-nuptial a right of action has accrued to her as from the moment of the commission of the tort, as it would to any other feme sole. But where the personal tort is committed during marriage no right of action ever accrues. The argument that it has accrued is purely circular—the wife cannot have a right of action unless she has an existing property to protect, and she has in such instance no property unless she has an existing right of action.

If the last paragraph of the judgment must be taken to mean either that bodily injury caused by negligence is not a purely personal tort or that a wife can sue her husband in tort for such injury when inflicted post-nuptially, then the last paragraph, it is respectfully submitted, is erroneous as well as obiter.

K. Y. L.

TORT—MASTER AND SERVANT—COURSE OF EMPLOYMENT

Warren v. *Henlys, Ltd.* [1948] 2 All E.R. 935.

B, the defendants' pump attendant, had an altercation with plaintiff concerning payment for petrol served. The affair seemed settled, and plaintiff's business with defendants ended, when B, having ascertained that plaintiff would report him to his employers, struck him.

Hilbery J. withdrew the case from the jury.

The blow was struck when the plaintiff's business with the defendants was completed: ' . . . it was an act entirely of personal vengeance '; ' it had no connection whatever with the discharge of any duty for the defendants '. It was, therefore, not within the course of B's employment.

Lloyd v. *Grace Smith & Co.* [1912] A.C. 716, was not considered. Here, the act was done out of personal spite, and not for the master's benefit. If it had been within the apparent scope of B's authority, could that be relied on as a factor taking it out of the course of B's employment? It seems so. Assuming personal spite and personal avarice are not in this respect distinguishable, yet *Lloyd's Case* seems to be limited to cases where the master holds the servant out as one in whom a client can place trust in the doing of acts actually or apparently authorised by the master.

K. W. M.

TORT—NEGLIGENCE—DUTY TO TRESPASSER ON LAND OF THIRD PARTY—ALLUREMENT

Buckland v. *Guildford Gas, Light and Coke Co.* [1948] 2 All E.R. 1086.

A high tension cable belonging to the defendants passed through the upper branches of a tree which stood on the land of a third party. A girl aged thirteen strayed from an unfenced footpath

ninety yards away, climbed the tree, and was electrocuted. Her father sued the defendants in negligence, alleging that (i) they were under a duty to protect persons who might be on the land from dangers which could reasonably be anticipated, and (ii) the tree was an attraction and they were under a duty not to allow live wires to pass so close as to endanger anyone climbing it. The defendants submitted that the girl was a trespasser on the land and they owed no higher duty to her than did the occupier.

Morris J. held that (i) the defendants had been guilty of negligence as described by Lord Atkin in *Donoghue* v. *Stevenson* [1932] A.C. 562, 580; (ii) the child was not contributorily negligent, nor did she wrongfully interfere with the wire; (iii) even if she was a trespasser on the land, the defendants' duty rested on a different basis from the occupier's. He also suggested that, were it necessary to consider the relation of the child to the occupier, the tree might be held to constitute an allurement sufficient to make her an implied licensee instead of a trespasser.

The idea that a tree can allure a child from a footpath ninety yards away shows a more liberal attitude than has hitherto prevailed. Cp. *Addie & Sons, Ltd.* v. *Dumbreck* [1929] A.C. 358.

It was not necessary, however, in the present case, to determine the status of the child, because (at p. 1092) ' the group of those who must be regarded as neighbours from the point of view of the defendants is not of rigid necessity the same as the group of those who must be regarded as invitees or licensees from the point of view of the occupier of the land ', though ' as a general rule a trespasser on land would not be within the group of neighbours '.

This is a new, though logical, application of the rule in *Donoghue* v. *Stevenson*, and a new limitation of the rule that a trespasser must take the land as he finds it. Nor need it be confined to trespass to land. The interesting nature of the problems raised is shown by the illustrations given from decided cases.

W. B. N.

TORT—NEGLIGENCE—EFFECT OF NOVUS ACTUS INTERVENIENS—JOINT AND SEVERAL LIABILITY

Grant v. *Sun Shipping Co., Ltd., and Another* [1948] A.C. 549.

The plaintiff, a stevedore, while loading a ship, fell through a hatch which had been left uncovered and unlighted by repairers, and

which had not subsequently been examined by the shipowners. In an action for damages, the House of Lords held that both the shipowners and the repairers were liable for statutory and common law negligence.

The main issue may be stated in these terms : were the repairers relieved of all liability for their initial wrong by the subsequent negligent omission of the shipowners? The court held that, in these circumstances, both defendants were jointly and severally liable. When damage is the result of the cumulative effect of a series of negligent acts, the liability of a wrongdoer is not necessarily excluded by the concurrent or subsequent intervention of another.

A similar result in a very similar situation was reached by Atkinson J. in *Jerred* v. *Dent & Son, Ltd.* [1948] 2 All E.R. 104.

Hogan v. *Bentinck West Hartley Collieries* [1949] 1 All E.R. 588, provides a contrast. The plaintiff, while at work, broke an extra thumb which protruded from the top joint of his normal thumb. It failed to heal after being set and on medical advice he had it amputated with the top joint of the ordinary thumb. He then suffered pain in the stump and brought an action against his employers. The county court judge found that the treatment of the injury was 'ill-advised' and that the pain in the stump was due to that treatment and not to the original injury, so that the employers were not liable to pay compensation. The House of Lords, by a majority of one, upheld the decision, holding that the issue was one of fact and that the county court judge had not misdirected himself. Though their Lordships' decision must be taken to conclude the particular instance, on the question of principle the powerful dissenting opinions of Lord MacDermott and particularly of Lord Reid are very persuasive and agree well with the principle of *Grant's Case*.

Subject, therefore, to this instance, *Grant's Case* shows the development of simpler rules of causation. It disposes of the rule of 'last opportunity'. Moreover, it emphasises the trend from 'possibility' to 'probability' of inspection under 'the manufacturer's rule' in *Donoghue* v. *Stevenson* [1932] A.C. 562, 599. The wrongdoer may no longer, by reason only of the fact of subsequent intervention, pass his whole burden on to those who contribute to the ultimate result, be they third parties or even the plaintiff himself. Damages are to be apportioned, and proportions are matters of fact.

E. L.

TORT—NEGLIGENCE—LANDLORD AND TENANT

Ball and Another v. *L. C. C.* [1948] 2 All E.R. 917.

THE defendants, during B.'s tenancy of their house, gratuitously installed a new boiler, which exploded, injuring B.'s daughter. The boiler was defective and dangerous, which the defendants knew or ought to have known.

Stable J. gave judgment for the plaintiffs. The defendants were negligent. The installation occurred during, not before, the tenancy (distinguishing *Davis* v. *Foots* [1940] 1 K.B. 116), and it was, therefore, irrelevant that the defendants happened to be landlords: they were, as regards liability, in the same position as independent contractors.

The decision is a logical result of the strict application of the rule negativing the lessor's liability for defects in the house let, yet it emphasises the weakness of its basis. If the rule is based on the lessee's duty and opportunity of inspection, why should it not extend to additions to the realty during the lease?

Here the installation being gratuitous points to a service by the landlord benefiting his reversionary interest. It seems, therefore, that a landlord who rebuilds a war-damaged house during a term is liable for negligence resulting in defective structure, for he is not protected for acts done after the commencement of the lease.

K. W. M.

TORT—NEGLIGENCE—LEAKING STOPCOCK DISLODGING PAVING-STONES—DUTY—STATUTORY POWERS—NUISANCE

Longhurst v. *Metropolitan Water Board* [1948] 2 All E.R. 834 (H.L.).

WATER from a leaking stopcock percolated downhill beneath the pavement, dislodging paving-stones. The Board, operating under statutory powers, repaired the leak, but did not permanently reinstate the pavement, this being the duty of the highway authority, Dartford Corporation, who were aware of the need to reinstate. Before the Corporation could effect the reinstatement L. stepped on a loose paving-stone which tilted and injured her.

Humphreys J. held that the Board were responsible for the consequences of the leak, since they were aware of the pavement's condition and had negligently failed to warn the public.

The Court of Appeal reversed this decision. Evershed L.J. admitted liability if the injury arose from a danger created by the

Board's unskilful intervention; if the Board created a danger they must protect the public from it; and if they discovered a hidden danger in the course of effecting repairs, then they may perhaps be under a duty to remove it. Finding no evidence that the looseness was apparent, he held that the Board did not in fact know, or have reasonable grounds for supposing, that a positive danger existed, and even if it had been apparent to them that it was in fact dangerous, they had no duty to protect the public—particularly having regard to the knowledge of the Corporation.

Tucker L.J., however, agreed with Humphreys J. that the Board knew or should have known the pavement's condition, but he pointed out that Humphreys J. overlooked the fact that the Corporation were equally aware of it, and, consequently, the Board were under no duty to report the condition to the Corporation. He seems to limit Evershed L.J.'s conclusion to the case where the Board may assume the Corporation's knowledge.

The House of Lords upheld the Court of Appeal on the grounds that there was no reason for the Board to suspect danger from the percolating water. No views were expressed on Evershed L.J.'s conclusion nor on its limitation by Tucker, L.J., but Lord Porter suggests it is arguable that, if the Board had known of the danger, they would have been under a duty to warn the public, whether the Corporation knew or not. Lord du Parcq seems to prefer the view that if the Corporation knew, the Board could not be liable.

It was further held that a statutory authority, acting under statutory powers, cannot be liable in nuisance unless negligence is established, quoting the authority of Lord Blackburn in *Geddis* v. *Proprietors of Bann Reservoir* (1878) 3 App.Cas. 430 at p. 455.

J. A.

TORT—NEGLIGENCE—RES IPSA LOQUITUR—TYRE BURST—REASONABLE SYSTEM OF TYRE MAINTENANCE—ONUS OF PROOF

Barkway v. *South Wales Transport Co., Ltd.* [1949] 1 K.B. 54 (C.A.).

The offside front tyre of the defendants' omnibus burst, causing it to crash through a railing and fall down an embankment. The plaintiff's husband was killed. The burst was caused by an impact fracture of the outer tyre, no evidence showing how this happened. Impact fractures may be invisible even to internal inspection. This tyre had been examined externally three days previously. Tyres used on bad roads were internally examined after every 25,000

miles. A deep puncture, which did not, however, cause the fracture, was found in the tyre after the accident, and there was evidence that the omnibus had travelled at an excessive speed during its journey.

The Court of Appeal (Scott and Asquith L.JJ., Bucknill L.J. dissenting) reversed Sellers J.'s decision awarding the plaintiff £2,000 damages.

Asquith L.J. summarised the case in three propositions: (i) Prima facie, the omnibus crash was a case of res ipsa loquitur and implied negligence. (ii) The tyre burst was itself a neutral event. (iii) To disprove negligence the defendants must show (a) that the burst resulted from a cause not connoting negligence, or (b) if not, that they used reasonable care in tyre maintenance. Scott and Asquith L.JJ. agreed that the maintenance system was satisfactory and that there was no negligence. The puncture did not cause the burst and the defendants were not negligent in not removing the tyre. There was no evidence that excessive speed caused the burst.

Bucknill L.J. did not think the defendants had rebutted the presumption of negligence by proving an adequate tyre maintenance system. They should have proved affirmatively they were not negligent in running an omnibus with a punctured tyre, and also that excessive speed did not cause the burst. The stricter view of the defendants' onus of proof is almost certainly that which would have been taken in Scotland. The Scottish attitude is illustrated in the Court of Session decision in *Mars* v. *Glasgow Corporation* 1940 S.C. 202, recently discussed and distinguished in *Ballingall* v. *Glasgow Corporation* 1948 S.C. 160. In the former case, the defenders contended negligence by a third party. Although all inferences supported this contention, judgment went against the defenders because they were unable to prove affirmatively the negligence of a third party.

E. ap G. L.

TORT—TRESPASSER OR INVITEE—CHILD AT CIRCUS—INJURY BY LION—LIABILITY OF PROPRIETORS

Pearson v. *Coleman Brothers* [1948] 2 K.B. 359 (C.A.).

THE plaintiff was a small girl, aged seven. While witnessing a performance of the defendants' circus, for which she had paid the entrance fee, she felt the need to relieve herself. Leaving the circus tent, she sought lavatory accommodation. None was provided and she wandered further in search of suitable seclusion. Unfortunately

the place chosen was beneath the ramp leading from the lions' cage to the main tent; the bars of the cagework were wide enough apart to permit the passage of a lion's paw and she sustained injury.

The cage formed part of a separate ' zoo ' enclosure but no extra payment was demanded. The entrance to this enclosure was suitably defined, although access by other means was not difficult for the young and agile.

The chief contention for the defence was that the child was a trespasser, and that liability accordingly was restricted. The county court judge supported this view, following *Robert Addie & Sons (Collieries), Ltd.* v. *Dumbreck* [1929] A.C. 358.

The Court of Appeal held otherwise, and allowed the child to recover. In the words of Lord Greene M.R., ' the problem is not to find out when the little girl became a trespasser, but to find out when she ceased to be an invitee ' (p. 373). That she had started as such was perfectly clear; had the defendants taken steps, as they were certainly entitled to do, to indicate this enclosure as excluded from the initial invitation? On the evidence produced it was decided that they had not. ' So far from indicating sufficiently to a child bent on such an errand that she must not go in, there is displayed before her what . . . is clearly not a prohibition but a temptation ' (p. 376). *Addie* v. *Dumbreck* must be distinguished on the grounds that in that case the children never ceased to be trespassers.

In this case the court were following their own previous ruling in *Gould* v. *McAuliffe* [1941] 2 All E.R. 527. These cases show clearly that, contractual arrangements apart, the categories of invitee, licensee and trespasser are comprehensive and exclusive. The law, therefore, relating to these categories remains unchanged. The appropriate category must be decided on the facts, a decision which, as here, may often prove of the utmost difficulty.

A. J. M. S.

✓ TRUST—CONSTRUCTIVE TRUST—ORAL UNDERTAKING—EQUITABLE FRAUD—LAW OF PROPERTY ACT, 1925, SS. 53, 54

Bannister v. *Bannister* [1948] 2 All E.R. 133 (C.A.).

The defendant conveyed two cottages to the plaintiff (who was her brother-in-law) at a price considerably below the market value upon the understanding that the plaintiff would let the defendant live in one of the cottages free of rent for as long as she should wish. The conveyance to the plaintiff contained no reference to this

arrangement, nor was the property conveyed to the plaintiff as trustee. The plaintiff served a notice to quit on the defendant with which notice the defendant refused to comply. The plaintiff then brought this action claiming possession of the cottage. The defendant counterclaimed (inter alia) for a declaration that the plaintiff held the property as trustee for the defendant. The county court judge who tried the case found that there was no fraud on the part of the plaintiff.

For the plaintiff it was argued firstly that the oral undertaking could not in its terms be construed as giving the defendant a life interest in the property; secondly that, even if it could, in view of the absence of writing and the provisions of ss. 53 and 54 of the Law of Property Act, 1925, the interest could take effect as an interest at will only; and thirdly, that a constructive trust in favour of the defendant (which, of course, the absence of writing would not defeat—Law of Property Act, 1925, s. 53 (2)) could only be raised against the plaintiff in a case of fraud, which the county court judge had expressly negatived.

Scott L.J., delivering the judgment of the Court of Appeal, held, distinguishing *Buck* v. *Howarth* [1947] 1 All E.R. 342, that the oral undertaking created a life interest determinable on the defendant ceasing to occupy the cottage. It was a mistake to suppose that because the conveyance to the plaintiff had not been fraudulently obtained it was not fraudulent of the plaintiff to seek to insist on the absolute character of the conveyance to him to defeat a beneficial interest; and equity does not allow the statute to be used as an instrument of fraud where, as here, there is sufficient oral evidence of a bargain which created a beneficial interest.

Accordingly, the defendant had a determinable life interest and, as such, the provisions of the Settled Land Act, 1925, would apply to it.

C. P. H.

TRUST FOR SALE—WHETHER PROCEEDS OF SALE OF LAND CAN BE INVESTED IN THE PURCHASE OF LAND—LAW OF PROPERTY ACT, 1925, S. 28—BENEFICIARIES ABSOLUTELY ENTITLED AND SUI JURIS

(a) *Re Wellsted's Will Trusts, Wellsted* v. *Hanson* [1948] Ch. 610.

(b) *Re Brockbank, Ward* v. *Bates* [1948] Ch. 206.

(a) In this case Vaisey J. held that section 28 (1) of the Law of Property Act, 1925, which confers on trustees for sale as regards land and the proceeds of sale all the powers of a tenant for life,

and of the settlement trustees under the Settled Land Act, 1925, does not authorise such trustees to apply the proceeds of the sale of realty in the purchase of other land *as an investment*, since, as regards those proceeds, they are not trustees with land to sell. Such a use of proceeds is authorised by section 28 (1) merely for a Settled Land Act purpose ancillary to unsold land held by the trustees.

The retention by the trustees of some land held on trust for sale is therefore essential to the operation of section 28 (1). This point is further illustrated by *Re Wakeman* [1945] Ch. 177, where Uthwatt J. held that, since all the land had there been sold, the trustees had ceased to be trustees holding land on trust for sale within section 205 of the Law of Property Act, 1925, and that section 28 (1) was therefore inapplicable. The power of trustees for sale to invest the proceeds of the sale of realty in other land is therefore limited. *Re Wakeman*, *supra*, establishes that some trust land must be retained unsold, whilst *Re Wellsted*, *supra*, now adds that the land to be purchased must be for the improvement or protection of the unsold trust land, examples being the purchase of a reversion in a lease, or of an easement over adjoining land.

(b) The courts have recently considered the extent to which beneficiaries may influence trustees in exercising their powers. Beneficiaries, absolutely entitled and sui juris, may terminate the trust, and *Re Cook* [1948] 1 Ch. 212, establishes that, should a sole beneficiary be sole trustee, the trust automatically determines. But whilst a trust continues, Vaisey J. held in *Re Brockbank*, *supra*, that the beneficiaries are not enabled by virtue of the fact that they are absolutely entitled and sui juris to control the exercise by the trustees of their fiduciary power of appointing new trustees. It may be that future decisions will reveal further limitations on the ability of beneficiaries, absolutely entitled, to control the trustees in the exercise of their powers. It appears, for instance, that in a case such as *Re Wellsted*, *supra*, the beneficiaries, even if absolutely entitled and sui juris, could not compel the trustees for sale to apply the proceeds in the purchase of land *as an investment*, though, if the trustees did so with the consent of such beneficiaries, the latter would naturally have no claim in respect of the breach of trust.

P. A. G.

[N.B.—Since the above note was written, the decision in *Re Wellsted*, *supra*, has been reversed by the Court of Appeal [1949] 1 All E.R. 577, on the ground that section 28 (1) of the Law of Property Act explicitly gives to trustees for sale 'all' the Settled Land Act powers.]

WILLS—SOLDIERS' WILLS—WILLS ACT, 1837, S. 11—ACTUAL MILITARY SERVICE—AIRMAN TRAINING IN CANADA FOR OPERATIONAL DUTIES

Re Wingham [1948] P. 138; reversed [1948] 2 All E.R. 908 (C.A.).

THE deceased, Roy Wingham, a Pilot Officer in the Royal Air Force, was sent to Canada for training, and while stationed there executed a testamentary document which did not comply with the provisions of the Wills Act, 1837. In the course of his training he was killed. The testamentary document was valid as a privileged will if the deceased was 'in actual military service' at the time of execution.

On a motion for a grant of letters of administration with the testamentary document annexed, Pilcher J. held that Wingham was not, when he made the will, in expeditione, or to use the words of section 11 of the Wills Act, 'in actual military service', and dismissed the application. In his opinion (at p. 149) service personnel in expeditione are confined at least to those who '(1) are actually engaged upon a campaign; (2) are proceeding or are under orders to proceed or to hold themselves in readiness to proceed upon a campaign; (3) are situate in what can properly be called a beleaguered fortress or war base from which active offensive or defensive operations are being conducted'. It would be wrong, he said, even under the conditions which prevailed in the last war, to regard the whole world as a theatre of war. These dicta seem to reflect accurately the law as it was then generally understood.

This decision was unanimously reversed by the Court of Appeal (Bucknill, Cohen and Denning L.JJ.). Bucknill L.J., Cohen L.J. substantially concurring, stated that the test is not whether the airman was in danger from enemy action: *Gattward* v. *Knee* [1902] P. 99, but whether: (1) the testator was on military service, and (2) the service was active in the sense that it was connected with operations directly concerning some war which was or had been in progress or was imminent. Wingham's service was of such a nature. He had abandoned his civil status and was liable to be ordered at any time to take part in active warfare. Denning L.J. went further, saying that the in expeditione test should no longer apply and that every soldier, doctor, nurse, etc., whether in the field, in barracks, in billets, or sleeping at home, was entitled, if actually serving in connection with military operations, whether hostile or training, which were or had been taking place or were imminent.

By overruling some of the earlier authorities, notably *Re Gibson* [1941] P. 118, this decision has greatly enlarged the scope of the privileged will.

J. D. W.

BOOK REVIEWS

Dr. Johnson and the Law. By Sir Arnold McNair, K.C. [London : Cambridge University Press. 1948. pp. 115. 7s. 6d. net.]

How this little book would have charmed that graceful Johnsonian Lord Justice MacKinnon ! One can indeed imagine his wondering why he had not written it himself. It is a book both grave and gay. Gay with good stories and with Sir Arnold's witty turns of phrase; grave in its concern with an aspect of Johnson's life in which he must have experienced a constant struggle against bitterness. In 1778, when Johnson was sixty-nine years old, William Scott (Lord Stowell in 1821), then a young man of thirty-three, said to him, ' What a pity it is, Sir, that you did not follow the profession of the law. You might have been Lord Chancellor of Great Britain, and attained to the dignity of the peerage; and now that the title of Lichfield, your native city, is extinct, you might have had it '. Johnson, upon this, seemed much agitated; and in an angry tone exclaimed, ' Why will you vex me by suggesting this, when it is too late ? ' Scott must have remembered all his life this inadvertent opening of a window into the old man's soul.

Sir Arnold's first chapter sets one upon a comparison in this vein between the lives of Johnson and William Murray, Lord Mansfield, only four years older, and upon speculation as to why Johnson, though in youth he admired his senior Hardwicke, and in old age his junior Thurlow, held Mansfield, his contemporary, of so little account; and why, as figures together in an intellectual society as small as was that of eighteenth century England, the two men, each in his own way supreme, never met. We know so much about what Mansfield did, and so little about what he was. But such glimpses as we have of him, and the set of his mouth, suggest a man of brilliant, ice-cold intellect, exquisitely, even affectedly, polite to his many acquaintances, but lacking warmth even during the brief moments of simulating it. Every generation of lawyers will call such to mind. To such a man Johnson's warmheartedness would not excuse his uncouthness. And Johnson may be forgiven for lacking enthusiasm about one who knowing the great scholar to be his intellectual equal did not condescend from his social height to seek acquaintance with him. Whether Mansfield's adulation of Garrick was, as Sir Arnold suggests, a major factor in determining Johnson's attitude is a matter for speculation, but it must have been at least a contributory one.

Sir Arnold gives, of course, an account of all the legal problems

which Boswell, who was both a Scots and an English lawyer, referred to Johnson. But one hardly takes Boswell seriously enough as a lawyer to regard him as one of Johnson's legal friends. Prominent among the latter, in addition to William Scott, were Sir Robert Chambers and Sir William Jones. Both became Indian judges : both are of particular interest to academic lawyers. Jones as the author of the classic little treatise on bailments won long remembrance; as an orientalist immortality. Chambers held the Vinerian professorship for fifteen years in succession to Blackstone, but a letter quoted by Sir Arnold tells us that Johnson held legal academic appointments of as little account as the English world for the most part held them until quite recent times. However, in the production of lectures Johnson supplied stimulus and help to his lagging friend.

One could open this book at any page and set going a train of pleasant and intelligent thought; few could read the footnotes without coming upon references to books of which they had never heard before, and in which they would be tempted to browse. If it is well advertised to lawyers it will have a considerable sale, for every one among them who aspires to regard himself as having some literary education will be ashamed to be without it.

H. A. H.

Inner Temple Papers. By Sir Frank Douglas MacKinnon, a Master of the Bench of that Honourable Society. [London: Stevens & Sons, Ltd. 1948. vii and 236 pp. 21s. net.]

This is a collection of essays, some of which have already appeared in print, varying in length from three to over a hundred pages. Some of the papers are devoted to personalities of the Inner Temple such as Sir Edward Coke, Sir Christopher Hatton who 'to the general stupefaction' became Lord Chancellor in 1587; Readers and their Coats of Arms, Benchers and Masters (1766–1837) and the Ritual of its Revels. Others deal with its buildings old and modern, and the Library, its curious inscriptions, and many other matters of which little can be found anywhere else. It is not a history, but its subject matter ranges from the early days of the *Inner* to the Ravages of War 1939–1945. It is delightfully written, interesting and amusing. The writing of an adequate review is not easy, for it deals with so many diverse topics, some in light and others in more serious vein. There are eleven plates of the *Inner* before and after the bombing. The book has given a great deal of pleasure and instruction and we cordially recommend it to others.

T. E. L.

1946 Annual Survey of American Law. [New York : University School of Law, Washington Square East, New York. xciv and 1497 pp. $5.]

In previous reviews of the 1942–1945 volumes of the *Annual Survey*, I have expressed my deep appreciation of their inspiration and assistance to teachers and practitioners of English law; and I repeat it with strong emphasis as to this 1946 volume. It deals with over fifty branches of the law, but limitation of space for my review compels me to give only a brief reference to three parts of the law—tort, contract and criminal law.

Mr. Kaufman, in his contribution on Torts (pp. 1003–1025), regards tort cases as numberless. Among the many summarised by him, an interesting case on pre-natal injuries to children is the federal decision of *Bonbrest* v. *Kotz* (p. 1007), in which it was held that a physician was liable for injuries caused to a child by malpractice in taking her from her mother's womb. Next, as to nervous shock, there are so many conflicting decisions on it that Mr. Kaufman regards the variety of judicial treatment as the only constant factor in this branch of the law; in a Tennessee case, *Jones* v. *Stewart* (p. 1013), where an eighteen-year-old boy committed suicide because the defendant falsely accused him of burglary, the defendant was held not liable because the suicide was too remote a consequence of the nervous shock. In the United States, decisions on nervous shock also conflict as to whether, if it was caused by negligence, there must have been physical impact; in West Virginia this has been held necessary, but in Texas, not necessary; of course in English law it is not necessary. Next, as to liability for malicious civil proceedings, in English law although it is tortious to institute maliciously certain civil proceedings (*e.g.*, bankruptcy petitions), it is not settled whether this extends to *any* civil proceeding. In a recent American case, *Soffos* v. *Eaton* (p. 1021), it was held that one who twice sues another maliciously and without probable cause is liable in tort; in the case itself, a landlord had maliciously brought four unsuccessful actions against his tenant and was, of course, held liable.

More than 200 cases on contract were decided in 1946, and Mr. Laurence P. Simpson comments on thirty of them (pp. 625–636). As to accord and satisfaction, in *Petersime Incubator Co.* v. *Klinke* (pp. 630–631), the Wisconsin Court upheld the validity of an accord by which half of the amount of a liquidated debt was received by the creditor in full satisfaction, though there had been prepayment of it without any bargain for it; this view, Mr. Simpson says, represents the current trend of judicial decisions, although he notes a Texas decision, *Turner* v. *Pugh*, which is the other way. In English law, the difficulty would be that the consideration in the *Petersime Case* was past.

One of the many branches of criminal law dealt with by Mr. J. Walter McKenna is on Negligent Homicide (p. 1039). He notes that there have been many cases on what constitutes involuntary manslaughter in homicide caused by negligent motoring; and that, apart from statutory provisions to the contrary, the tendency seems to be to hold that the negligence must be gross.

A topic on which the Supreme Court of the U.S. gave a decision in *Fisher* v. *U.S.* (p. 1050) was the defence of partial insanity, *i.e.*, a mental defect not severe enough to meet the test of capacity to distinguish between right and wrong. Fisher had mental derangement which made him unable to resist the impulse to kill a person, and the Supreme Court held that he was rightly convicted of murder, in spite of the defence of premeditation and deliberation; but the decision was only by a majority of four to three and is criticised by Mr. McKenna as rather technical because 'sudden rage or fear' ought to 'compel murder to be classed as second degree' (*i.e.*, not punishable with death).

I hope that the *Annual Survey* will be as 'continuous as the stars that shine'.

P. H. W.

Interpretations of Modern Legal Philosophies. Essays in Honor of Roscoe Pound. Edited with an Introduction by Paul Sayre. [New York: Oxford University Press. 1947. 807 pp. 63s. net.]

It was fitting that the homage paid to Dean Pound on the occasion of his seventy-fifth birthday should be expressed in massive and encyclopædic scholarship of the kind represented in this volume. Within the limits of this notice it is possible to enumerate only some of the weighty contributions to this collection of essays. They include those by Dr. C. K. Allen on 'Justice and Expediency'; Professor E. Balogh's 'Note on Thomas Hobbes'; by Huntington Cairns on 'Philosophy as Jurisprudence'; by A. H. Chroust on 'The Nature of Natural Law'; by Giorgio del Vecchio on 'Truth and Untruth in Morals and Law'; Professor Goodhart's 'An Apology for Jurisprudence'; Professor Gutteridge on 'The Province of Comparative Law'; by Professor Hocking on 'Justice, Law and the Cases'; Mr. Walter Jones's essay on 'Cino de Pistoia'; on 'The Metamorphoses of the Idea of Justice' by Professor Kelsen; Professor Lundsted's essay entitled 'Law and Justice: A Criticism of the Method of Justice'; by Dr. Meyendorff on 'The Tragedy of Modern Jurisprudence'; on 'Pound's Theory of Social Interests' by Professor Patterson; Professor Max Radin's essay entitled 'Ex Facto Jus; Ex Jure Factum'; Professor Rheinstein's essay on some perennially topical problems of the judicial function (under the title 'Who Watches the Watchmen?'); by Professor Julius Stone on

'The Fallacies of the Logical Form in English Law'; by Professor Winfield on 'Recent Reforms of English Private Law'; by Lord Wright on 'Natural Law and International Law'; and—last but not least—the intemperate but scholarly and stimulating essay by Judge Jerome N. Frank entitled 'A Sketch of an Influence'.

The last-mentioned essay challenges the widely accepted view of the liberalising and progressive character of Blackstone's teaching, in particular in its influence upon the American Revolution and the ideas of the War of Independence. Judge Frank's thesis is that the true purpose of the *Commentaries* was to supply a justification of a corrupt, obsolete and reactionary legal system; that, for that reason, the doctrine of the legislative omnipotence of the sovereign Parliament must be regarded as the principal feature of Blackstone's exposition of the law of England; and that the frequent appeal to the law of nature—a recurrent theme of the *Commentaries*—was designed to cloak with a garb of moral respectability what was in essence a doctrine of absolutism. The article will well repay reading—though it may be difficult to admit that the learned author has come near to proving his thesis. Admittedly, these two streams of thought—that of the supremacy of Parliament and that of the supremacy of the law of nature—which run through the *Commentaries* do not appear to meet. The uncertainty is not diminished by such phrases as that Parliament can do 'everything that is not naturally impossible', and that the 'principal aim of society is to protect individuals in the enjoyment of those absolute rights which were vested in them by the "immutable laws of nature"'. Is it 'naturally possible' for Parliament to enact legislation which is contrary to the 'immutable laws of nature'? However, the decisive question is: Which aspect of the great lawyer's teaching proved most influential as a factor in moulding opinion and directing the actions of men? It is possible that the Cabinet of Lord North and those who supported him found succour in Blackstone's praise of the excellence of the laws of England and of the absolute supremacy of Parliament. On the other hand, the fathers of the Revolution—and a host of others outside the United States—drew inspiration from the solemn emphasis upon the absolute rights of the individual. Judge Frank may or may not be right in maintaining that they were deceived by catch-phrases concocted by a clever lawyer intent upon bolstering up the cause of reaction. What matters is that these catch-phrases, and not the purported reactionary design, proved the true source of Blackstone's influence. Similarly, there will be justifiable hesitation in accepting Judge Frank's view that in using—or abusing—the doctrine of the law of nature for championing the cause of oppression Blackstone was adopting the typical use of natural law doctrines. Judge Frank is not alone in holding the opinion that, as a matter of history, the notions of the law of nature have served the purpose of supplying a plausible justification for social injustice

and oppression. Yet it is extremely doubtful whether this view of the function of natural law represents a balanced and accurate account of the part which it played in the history of thought and action. The preponderant and, probably, better opinion is that which, in the words of Mr. Chroust in another part of the volume (p. 80), recognises 'the immemorial merits and ideological importance' of natural law as the moral standard of the fitness and the adequacy of the law. Judge Frank may have added to the difficulty of his task by coupling a challenge to Blackstone with an attack upon the law of nature. However that may be, his essay remains one of the most stimulating in a volume which is itself a weighty contribution to legal philosophy.

H. L.

A Textbook of the Law of Torts. Fourth edition. By P. H. Winfield, K.C., F.B.A., LL.D., Emeritus Rouse Ball Professor of English Law in the University of Cambridge, of the Inner Temple, Honorary Bencher and Barrister-at-Law. [London: Sweet & Maxwell, Ltd. 1948. xxxvi and 666 and (index) 15 pp. 40s. net.]

Cases on the Law of Tort. Fourth edition. By the same author [London: Sweet & Maxwell, Ltd. 1948. xii and 381 pp. 30s. net.]

These two volumes have run into four editions in eleven years, no better testimony is required of their first class quality and usefulness. The *Textbook* has established itself as the leading work on the subject with students and practitioners, it is constantly being cited in court by Bench and Bar. 'I can think of no better definition of nuisance than this, given in Winfield's *Textbook of the Law of Tort*, 3rd ed., p. 426'—*per* Lord Goddard C.J., in *Howard* v. *Walker* [1947] 2 All E.R. at p. 199. Many passages have been judicially approved and further acknowledgments appear in *Read* v. *Lyons* [1947] A.C. at p. 182, *per* Lord Simonds. By very careful pruning and with the addition of fifteen pages, over eighty new cases are incorporated in the text and footnotes, as well as the considerable reforms effected by the National Insurance (Industrial Injuries) Act, 1946, and the Crown Proceedings Act, 1947. Decisions of first rate importance such as *Read* v. *Lyons*, *Christie* v. *Leachinsky*, *Searle* v. *Wallbank*, *Mersey Docks and Harbour Board* v. *Coggins and Griffith, Ltd.*, are examined in detail. Nothing has been overlooked and the law is stated as at the end of March, 1948, when the book went to press. The Law Reform (Personal Injuries) Act, 1948, had not then been passed, but a short reference is made to it in a slip inserted at p. 128. The author pointed out to the reviewer as soon as the book was

published that an amendment should be made at p. 85, namely, that in this connection, petition of right was abolished by the Crown Proceedings Act, 1947, Schedule I.

In the Case Book the four cases mentioned above have been incorporated as leading cases, and some fifteen others have been added to the notes.

T. E. L.

The Heralds of the Law. By C. G. Moran, of the Inner Temple, Barrister-at-Law. [London : Stevens & Sons, Ltd. 1948. vi and 110 and (index) 5 pp. 17s. 6d. net.]

The author of this delightful collection of essays has been engaged in law reporting since 1903 and has been sub-editor of the *Law Journal Reports* for a decade. Little do we realise the exacting hard labour involved in the preparation of our law reports; the author enjoys it, and we commend his essays to all concerned with the law, for they well indicate the debt of gratitude which we owe to the reporters. Here will be found the history of law reporting with choice extracts from the Year Books, and due tribute is paid to Plowden and Coke, and to Lord Mansfield's reporter—Sir James Burrow. Separate chapters are devoted to the Control of Law Reporting and Copyright in Judgments and in Law Reports, and at p. 51 we find when official shorthand notes are taken. The variety of views expressed on the difficult question of what cases shall be reported is dealt with in the seventh chapter and summarised at p. 70. The essay on the Headnote is particularly instructive, both as to its content and form. The Report of the Lord Chancellor's Committee on Law Reporting, 1940, is carefully analysed, and the last essay deals with the function of the editor and the task of the law reporter of today.

T. E. L.

A First Book of English Law. By O. Hood Phillips, M.A., B.C.L. (Oxon), of Gray's Inn, Barrister-at-Law; Barber Professor of Jurisprudence in the University of Birmingham. [London : Sweet & Maxwell, Ltd. 1948. xx and 271 pp. 16s. net.]

The difficulty in a work of this nature is to decide how much is to be left unsaid. The author expresses a hope that he may not appear too dogmatic, but he need have no fears on this account.

A general Introduction is followed by Part I dealing with 'The Courts', then by Part II dealing with 'The Sources of English Law', and the author tells us in his Preface that he has dealt with the latter 'relatively fully'. The treatment of Mercantile Customs is particularly good. The final Part III deals with 'The General Principles of English Law', and includes an outline of Criminal Law, Property, Tort, Contract and Persons. It is the

most selective part of the book, and this is probably the reason why it seems to fall short of the high standard of the first two parts. Throughout the book there is a wealth of information. Thus, the explanation of the kinds of law reports likely to be encountered, the select table of private reports (pp. 134–6), their relative value, and methods of citation will surely save beginners many a moment of needless perplexity. Note (*a*) on p. 124 explains the title of civil and criminal cases, and note (*k*) on p. 166 even gives the pronunciation of 'Coke'.

The reference to the Statute of Uses on p. 10 is not explained. It would be more satisfactory if this were eliminated altogether and the rest of the paragraph devoted to an explanation of a trust. Proposition (ii) in the middle of p. 107 might well be reconsidered in the light of *Williams* v. *Glasbrook Bros., Ltd.* [1947] 2 All E.R. 884. It is surprising that the 'General Principles of Criminal Liability' should omit all reference to '*actus reus*', and at p. 181 one wonders why the burden of proof on the accused is limited to the defence of insanity. At p. 184 we find an examination of the word 'property'. It is suggested that the discussion of this complicated term is undesirable in an elementary book. The author's explanation bristles with controverted issues, and it is questionable how far the description of property as 'proprietary rights *in rem*' advances the reader's knowledge. Again, reference is made (p. 184) to '. . . (rights *in personam*), in particular those created by obligation (contract and tort)', and at p. 202 we find: 'a tort is the breach of a right *in rem*'. Either these two remarks should be eliminated, or else rephrased and explained so as to distinguish between the primary and sanctioning rights involved in tort. Finally, in view of the author's immediate qualification of the word 'enforceable' in his definition of a contract (p. 219) it may be asked whether some other word, *e.g.*, 'recognised', would not be appropriate.

These criticisms apart, the material is presented and handled in a manner that is calculated to preserve the spark of enthusiasm with which most students begin, and the book is recommended as a valuable introduction to English law.

R. W. M. D.

An Introduction to Criminal Law. By Rupert Cross, M.A., B.C.L., Solicitor, Fellow of Magdalen College, Oxford; and P. Asterley Jones, LL.B., M.P., Solicitor, Tutor at the Law Society's School of Law. [London: Butterworth & Co., Ltd. 1948. First edition: xliii and 322 pp., Index, 24 pp. Second edition: xlviii and 330 pp., Index, 26 pp. 21s. net.]

It is not often that the first and second editions of a book come out in the same year. That fact is a tacit tribute to its popularity.

The chief alterations that have been made in the new edition are indicated in the Preface, the most important being the incorporation of the provisions of the Criminal Justice Act, 1948, into the text. The alteration of the definition of Assault (p. 234 of the new edition) is particularly welcome, and the idea of 'continuing trespass' in connection with *R.* v. *Riley* (1853) Dears. C.C. 149, instead of 'relation back', is more accurate. Numerous alterations have been made, and the whole book and particularly the case-law has been carefully revised. All this has been accomplished with the addition of eight pages to the substantive portion of the book, and on the whole the new edition seems to be even better than the first. One feature of the book is that the statement of principle is contained in numbered Articles, the more important of these being followed by an 'Explanation' in smaller print which includes a discussion of controverted points, relevant cases and other points. The authors have not indicated why they have chosen this method of exposition, but in its favour may be counted the fact that it does help to distinguish principle from detail.

It is a matter of opinion whether the nature and definition of a crime should be discussed at the commencement. Professor Kenny, it will be remembered, advised the postponement of this topic in his book until after the subject had been covered. The well-known maxim, quoted at p. 36, that 'everyone is presumed to intend, or at least to foresee, the natural consequences of his behaviour' should be carefully explained. If it were taken literally there could be no such thing as negligence, since legally there could be no failure to foresee the natural consequences. Students use it too often as a means of escape from more subtle analysis. It is not really clear how far the authors agree with the suggestion which they quote (p. 46), that the distinction between *R.* v. *Tolson* (1889) 23 Q.B.D. 168, and *R.* v. *Wheat and Stocks* [1921] 2 K.B. 119, lies in that the mistake was one of fact in the former case and one of law in the latter. The status of marriage is a fact; and in both cases the mistake was whether the accused was married or not. The reasons which induced the accused to believe that he was not married cannot change the nature of the mistake as being one of fact. The authors seem to imply that this is also their view, but their discussion is unnecessarily confusing. At p. 51 the rule is given that a person who becomes insane after sentence of death cannot be hanged, but the reason given is a repetition of something Kenny said. The true origin of the rule seems to be completely obscure, and Kenny's suggestion is one for which he cites no authority and which on the face of it hardly looks satisfactory. A few historical points deserve attention. Is it accurate to suggest (p. 154) that the *Carrier's Case* (1473) Y.B. 13 Ed. 4, fo. 9, pl. 5, was decided on the doctrine of 'breaking bulk'? This doctrine was a later notion that was attributed to the *Carrier's Case*. The decision in the case of *R.* v. *Holland* (1841)

2 Mood. and R. 351 (p. 213) is difficult to reconcile with the principles of murder and manslaughter as enunciated in Articles 127 and 128. *Holland's Case* was decided at a time when the principles of murder and manslaughter had not become settled in their modern form. The case is quoted as illustrating the rule that the contributory negligence of the accused is no defence, but it should be clearly pointed out that the case is no longer good law on the homicide point. At p. 224 the statement is made that ' assuming that all the elements of a case of provocation are present, if a person kills someone other than the person who provoked him when aiming at the latter, he will only be guilty of manslaughter ', and the authority cited is *R.* v. *Gross* (1913) Cox C.C. 455. However desirable this conclusion might be, the question that arises immediately is how far the case has been affected by the later rule in *Beard's Case* [1920] A.C. 479, and the point deserves attention.

A few minor verbal alterations are also respectfully suggested. Page 28, line 20 : ' known later as ' might be altered to ' replaced later by '; p. 152, line 12 from the foot of the text : ' codifies ' should be ' consolidates '; and p. 201, line 2 from the foot of the text : the phrase ' intention to do the act wilfully ' needs re-casting.

None of these criticisms are substantial, and indeed, the hypercritical nature of some of them is evidence of the high standard of the book. It satisfies the need for a simple introduction to Criminal Law, due largely to the fact that the classic Kenny is rapidly becoming obsolete. Within about half the compass of Kenny or Wilshere the present work purports ' to give all students a bird's eye view of their subject and to give those who are not called upon to study it very deeply all the information they require ', and there is no doubt that it achieves its object.

R. W. M. D.

A Selection of Leading Cases Illustrating the Criminal Law. By A. M. Wilshere, m.a., ll.b., of Gray's Inn, Barrister-at-Law. Fifth edition. [London : Sweet & Maxwell, Ltd. 1948. vii and 540 pp. 30s. net.]

Case-books are always welcome to the hard-pressed student, who is at all interested in reading cases, and the new edition of *Wilshere's Cases* should prove no exception. It is up to date, and it is evident that the author has exercised great care and restraint in his selection of cases. General principles, which are the student's main concern, are certainly illustrated by the cases which have been chosen, and the important parts of the judgments are indicated in thick type, although it would, perhaps, have been better if the discrimination of the essential from the unessential had been left to the students themselves. R. W. M. D.

The Journal of Criminal Science. A Collection of Papers Issued from time to time under the Auspices of the Department of Criminal Science, Faculty of Law, University of Cambridge. Edited by L. Radzinowicz, M.A.(Cantab.), LL.D.(Cracow), LL.D.(Rome), and J. W. C. Turner, M.C., M.A., LL.B. Volume 1. [London : Macmillan & Co., Ltd. 1948. 207 pp. 15s. net.]

In this volume the Department of Criminal Science has taken a further line in the study of criminology. The aim of this new series, ' is to present material which will be of use both to those who take part in the administration of criminal justice and to all who are interested in the impact of crime on modern society '. That represents the keynote of the eleven articles which are comprised in the book.

Of direct importance to those interested in substantive law are the articles by Sir Roland Burrows, K.C., on ' The Responsibility of Corporations under Criminal Law ', and by G. Ellenbogen on ' The Principles of the Criminal Law Relating to Insanity ', the latter being the Lee Prize Essay of 1946. In the article entitled ' Sexual Crime ', Sir William Norwood East, M.D., F.R.C.P., embarks on an investigation of the kinds and causes of sexual misbehaviour and the more pressing problem of its treatment. ' The Organisation of the Metropolitan Police ' by Sir Harold Scott, K.C.B., K.B.E., and ' Methods of Crime Detection ' by Ronald Martin Howe, M.C., are closely associated with each other and provide careful studies of the methods of the police, coming from the Commissioner of Police of the Metropolis and the Assistant Commissioner of the Criminal Investigation Department of Scotland Yard respectively. The piece of detection narrated at pp. 104–9, beside which the apocrypha of fiction writers pales into insignificance, brings out the routine nature of these brilliant but little publicised achievements, and one has to think back to a case like the Gutteridge murder in 1927 for a similar example. ' Sociological Research in Criminology in the United States ' by Professor Donald R. Taft is divided into three parts, dealing with the nature, types and examples of such research, the last part being perhaps the most instructive. Professor J. M. van Bemmelen gives an account of ' The Treatment of Political Delinquents in Some European Countries ', a careful discussion of a debatable subject. A. C. L. Morrison, C.B.E., modestly prefaces his article on ' The Protection of the Accused ' with the remark, ' As I am neither a scholar nor a member of the legal profession it is obvious that I could not claim to write with any authority '. Yet his article is a challenge of certain well-known rules of evidence and procedure which are, in his opinion, ' too favourable to the accused '. He admits that it is right that if the system errs at all it should err on the side of

leniency. Everyone, including those who may have wondered if the law does not at times err too much on the 'right side' and those who have not thought about it at all, will be amply rewarded by reading this article. Professor S. Glaser, LL.D., has written on 'A Draft Code of Minimum Rules for the Treatment of Persons Suspected or Accused of Crimes', and the detailed provisions are preceded by an Introductory Note by the editors explaining the circumstances of its preparation. W. G. Minn has written on the 'Training for the Work of a Probation Officer in England and Wales', a report by the Probation Branch of the Home Office, and finally, F. T. Tarry, C.B.E., has written on 'The Police Exhibition', which was held at Brighton in June, 1946.

The book has been able to focus information on many aspects of criminology and has accomplished this in a convenient and handy volume. It is with pleasure that we look forward to the second volume already foreshadowed in the Editorial Note.

R. W. M. D.

An Introduction to the Criminal Law in Australia. By J. V. Barry, K.C., and G. W. Paton, M.A., B.C.L., assisted by G. Sawer, LL.M.; Preface by Professor P. H. Winfield, K.C., LL.D., F.B.A. [London : Macmillan & Co., Ltd. 1948. x and 128 pp. 10s. 6d. net.]

This is the sixth volume in the series entitled *English Studies in Criminal Science*, published by the Department of Criminal Science in Cambridge and edited by Dr. L. Radzinowicz and Mr. J. W. C. Turner. The names of the authors and the auspices under which the book has been published dispense with the need for a detailed review. Professor Winfield explains in the Preface that the book was written in response to an invitation by the editors. The Historical Introduction in the opening chapter and General Principles of Criminal Liability (Chapter 3) are worth reading and re-reading. The latter, which presents a good basis for comparative study, is sub-divided into two parts. Part A on The Common Law States takes us successively through the common law principles of liability and defence. Particularly interesting is the disposal (p. 24) of the suggestion that the distinction between *Tolson's Case* (1889) 23 Q.B.D. 168, and *Wheat's Case* [1921] 2 K.B. 119, rested on a mistake of law in the latter case. Part B deals with The Codes, and discusses in turn the same topics as Part A, thus presenting the contrast with the common law. Many sections have been reproduced verbatim to help the appraisal of 'the attempt to reduce to a set form the rather flexible doctrines of the common law'. Chapter 4 deals with Evidence and Procedure, Chapter 5 with Special Types of Criminal Legislation, and Chapter 6 with Punishment and Treatment of Offenders.

Chapter 5 contains a discussion of some aspects of the legislation concerning immigration and industrial disputes, with some amusing incidents which have arisen over the former.

'The Cambridge Department is greatly indebted', says Professor Winfield, 'to our Australian friends for their most kind collaboration in bringing our initial scheme to fruition'. To this one can only add that everyone interested in the study of criminal law will also stand indebted to the authors and the Department of Criminal Science for having provided this clear, concise and informative exposition.

R. W. M. D.

Crown Proceedings. An Account of Civil Proceedings By and Against the Crown as affected by The Crown Proceedings Act, 1947. By Glanville L. Williams, ph.d., ll.d.(Cantab), Reader in English law in the University of London, of the Middle Temple, Barrister-at-Law. [London : Stevens & Sons, Ltd. 1948. xviii and 157 pp. 12s. 6d. net.]

This 'critical appraisal' of the Crown Proceedings Act ought to be read by every English lawyer. The author has produced a comprehensive and penetrating analysis of the position which the Crown and public corporations used to enjoy prior to the Act of 1947, and the modifications created by that Act. No stone seems to have been left unturned. The author's wide and accurate knowledge of the law and its history has enabled him to consider the provisions of the Act in the light of various and often obscure rules of law. A good many of the points raised may appear exceedingly subtle, and it is to be gathered from occasional footnotes that some of these, at any rate, had been brought to the notice of those responsible for the Act while it was still in the Bill stage, but had been rejected for some reason. The value of these points, however, is that they clarify those issues which are still unsettled, provide a basis for future amendment and, of course, always furnish counsel with ammunition for argument should the questions arise.

The subject-matter of the book is no mere recital of the provisions of the Act. Indeed, it is a matter for regret that the possibility of delay prevented the inclusion of at least the text of the Act, but since the relevant passages from the sections are quoted when necessary, this omission is not seriously felt. Throughout the book the background of the common and statute law has been luminously expounded. Particularly interesting are the remarks on pp. 43 and 79 relating to the basis of a master's vicarious responsibility in tort and the *Amerika Case* ([1917] A.C. 38) respectively. The suggestion that in the *Amerika Case* the recovery of the voluntary payments might have been justified by

way of 'parasitic damages' is a little questionable. Should not the 'parasitic' items of damage themselves be caused by the defendant's act, and not the act of the plaintiff?

The book is a worthy successor to the author's similar work on *The Law Reform (Frustrated Contract) Act, 1943*, and it provides sound material for study as well as speculation.

R. W. M. D.

The Crown Proceedings Act, 1947. By J. R. Bickford Smith, B.A. (Oxon), of the Inner Temple, Barrister-at-Law; with the Scottish application of the Act by K. M. B. Middleton, B.A. (Oxon), LL.B. (Edin), Advocate of the Scottish Bar; Sheriff-substitute of Perth and Angus at Forfar. [London: Butterworth & Co. (Publishers), Ltd. 1948. xii and 138 pp. and (index) 18 pp. 15s. net.]

This volume which is reprinted from the publishers' Annotated Legislation Service, is clearly one which has involved much skill and labour. For the most part it is a practitioner's book, much of the annotation being devoted to procedural matters and the Rules of the Supreme Court (Crown Proceedings), 1947 are set out in an Appendix. At the same time, it will be of considerable value to the student for the author has done much more than merely annotate; he has rightly seized upon the point that the Act cannot be understood without a knowledge of the law as it existed before 1948. Accordingly, in a most valuable introduction of some 48 pages, he has reviewed such parts of the law as form the background to the Act, stated the main changes effected by it and summarised the procedure in actions by and against the Crown. Here the student will find a concise yet comprehensive summary of the old law which will enable him to understand the provisions of the Act.

Upon one or two matters the author would, no doubt, have wished for more space in which to develop details. We have in mind, for example, the statement (at p. 13) that *Dunn* v. *Macdonald* is authority for the statement that a servant of the Crown, acting in his official capacity, who exceeds his authority is under no liability for breach of an implied warranty of authority. It is at least open to question whether such a proposition is true in cases where the Crown servant is not engaging another in the service of the Crown. Again, it is said (at p. 30) that the combined effect of s. 2 (6) of the Act and the decision in *Fisher* v. *Oldham Corporation*, is 'that neither the Police Authority nor the Crown is liable for a tort committed by a policeman in the course of his employment'. In the case cited, however, McCardie J. (at p. 377) limited himself to a finding that 'the police *in effecting that arrest* . . . were not acting as the servants or agents of the

defendants', and it is possible that in committing some tort not connected with effecting an arrest a policeman may be acting as servant so as to make the Police Authority liable. These are but details, however, and do not detract from the merits of the book as a useful and accurate guide to the Act and many of the explanations (we have in mind particularly the one on s. 4 (3)) are novel and interesting.

Since the Act extends to Scotland, there is included a ten-page summary of the law as it applied to Scotland before the passing of the Act.

T. C. T.

The Principles of Liability in Tort. By Harold Potter, ll.d., Professor of English Law in the University of London, King's College, etc. [London: Sweet & Maxwell, Ltd. 1948. 75 pp. 10s. net.]

This short book, a reprint of the introductory chapter to the Tenth Edition of *Clerk & Lindsell on Torts*, is a new and original piece of work by Professor Potter. If the value of such a survey is to be measured by the ideas and queries which it raises in the mind of a reader, even one supposedly familiar with the topics here treated, then this survey has very great value. I have seldom read an essay which has given me so many new points of departure, often quite casually. On the other hand, it is evidently impossible in the compass of some seventy-five pages to provide a systematic account of the principles of liability and the essay has an inconclusive and disjointed effect. It is the obiter dicta and almost the table talk of the very learned editor of *Clerk & Lindsell*: I found the style elliptical and the sequence often difficult to follow. It is not in my opinion a book for the commencing student; indeed it is not intended to be. It is rather a series of hints and suggestions to practitioners which, as the author rightly hopes, may afford them 'some guidance in solving new and unforeseen problems'. It is also of use to lecturers on the law of torts who may be endeavouring to put in order their own exposition.

The review of such a book in a short note presents difficulty: every reviewer would find much that he would wish to discuss. By way of criticism I would say that the section on 'Mental Element' (pp. 35–50) appears to me to require reconsideration. It may be that in tort the defendant's actual state of mind is generally speaking irrelevant except in those relatively few torts, such as fraud and malicious prosecution, of which the definition contains expressly a reference to a state of mind: what is highly relevant is the standard of behaviour in the particular instance which the law expects the defendant, whether wicked or innocent,

whether wise or foolish, actually to attain. Indeed Professor Potter sometimes so speaks—see *e.g.*, p. 35 and p. 41; but sometimes—*e.g.*, p. 47—the subjective and the objective factors appear to be confused. Similarly I was not attracted by the exposition of volenti non fit injuria. That is a rubric in the law which has been used by judges as a receptacle for almost any inconvenient or undigested notion; and it is no doubt not the writer's fault that he has not succeeded in making a final arrangement of it.

On the other hand, among the many suggestions which attracted me I would select Professor Potter's treatment of the classification of torts as based alternatively on the plaintiff's right which has been infringed or on the defendant's wrongful conduct. Right and duty are strictly correlative; but the mere change in the form of the question asked is here, as often, most illuminating. I respectfully believe that Professor Potter is correct in supposing that where the plaintiff's right is prominent the tort is likely to be actionable without proof of damage but where the defendant's wrong is stressed, the plaintiff is more likely to have to show such damage; and that this distinction may give us a clue to the category of torts actionable per se—which seem strange to systems that are based on a notion of reparation and which merit more study than they have received. He also suggests that the recognition of a right is often the by-product of attention paid to what constitutes the defendant's wrong and may be a method of developing and rationalising the law.

The reader will be grateful to Professor Potter for his hints and suggestions and will regret the more that they have not been correlated into an ampler whole.

C. J. Hamson.

Introduction to the Law of Contracts. By Sir Charles E. Odgers, M.A., B.C.L., etc. [London: Sweet & Maxwell, Ltd. 1948. xxviii and 400 pp. 25s. net.]

This book is intended as a 'first book' for a student of the law of contract, and an attempt is made to explain elementary terms. It is likely to be especially popular with, and helpful to, candidates for professional examinations. Perhaps that is why it wears an air of over-simplification, which is enhanced by the almost entire absence of any reference to more thorough-going discussion of difficult points.

The reviewer believes it to be an error not to insist even with the beginner that in some parts of the law of contract there is a degree of complication which makes misleading any simple statement by an author. The method by which such parts are treated should at least be distinguished from that appropriate to those

other parts which are relatively settled and clear. In this book all parts are treated with the same assurance.

One of the chief merits of the book is its clear and concise style. It is eminently readable : the author neither needs nor has recourse to different sized print to make his meaning clear. The author is also to be congratulated on the citation of a great number of cases not usually to be found in elementary introductions.

Although this is a first edition and although the book is evidently a new and original restatement of the law of contract, there are passages which give the impression that the author is making insertions into a text constructed some time ago. For example, the introduction of *Morgan* v. *Ashcroft* at p. 346 is unhappy : it is appropriate to the third paragraph on p. 347 (where it is noted) and it should have been noted at p. 205. It may also be suggested that it is unnecessary, in an elementary textbook written in 1947, to discuss the cases decided under a section of the Public Health Act, 1875, which was repealed in 1933, though the repeal is noted.

C. J. Hamson.

Williams on Title. The Law and Practice relating to the Contract for Sale of Land and the Title to Land. By W. J. Williams, B.A., of Lincoln's Inn, Barrister-at-Law. [London : Butterworth & Co. (Publishers), Ltd. 1948. cxxxvi and 632 and (index) 83 pp. 72s. 6d. net.]

This book, written by the conveyancing editor of the *Encyclopædia of Forms and Precedents*, is intended for use by solicitors and their conveyancing clerks. The Preface explains that it contains virtually all that the conveyancer will want to know, cites all the relevant authorities, and yet does not assume any previous knowledge other than that which everyone in a lawyer's office can be expected to have. Evidently, therefore, it is a book planned with an admirable purpose, and the measure of its achievement will best be judged by that branch of the profession for which it is primarily designed. With an ample Index, Table of Statutes (to the Planning Act, 1947) and Table of Cases (covering 102 pages), it is not an unwieldy book; and it is written from the standpoint of the modern law.

It begins in an elementary way with a chapter entitled 'Essentials of a Contract' and thence proceeds to 'The Memorandum in Writing' and 'Payment of Deposit'. It then becomes increasingly a book for the experienced practitioner, meeting squarely the rigours of conveyancing law and practice, elaborating them in footnotes containing the effects of the cases,

and pausing occasionally to explain some elementary point—such as the meaning of dower, curtesy and base fee. The valiant attempt to supply the elements as well as the austerities of the subject is assisted by a very interesting innovation—a long chapter entitled 'Capacity of Parties', which absorbs nearly one-half of the book. In this chapter there are thirty-two sub-titles, arranged alphabetically, which range from 'Aliens' to 'Universities and College Estates'; and they comprise, besides the customary Infants, Convicts, Married Women and others, all those whose conveyancing powers are abnormal—including, for instance, Companies, Partners, Joint Tenants, Tenants for Life, In Tail and In Common, and Trustees for Sale. And under each sub-title there is some introductory matter as well as the more advanced and technical aspects of the subject. The remainder of the book covers the normal topics, leading up to and following Completion, and concludes with short chapters on Registered Land and Copyholds.

As a practical manual, dealing faithfully with the technicalities of the existing law, it is undoubtedly an impressive achievement. There are a few minor slips, such as 'curtsey' (p. 205), 'unequivocable' and 'unequivocably' (pp. 60, 62), and 'vendor' (should be 'lessor'?—p. 13, l. 9). There are also some unexpected omissions: *e.g.*, the conditions of sale implied in contracts by correspondence are mentioned several times but are not stated, and the treatment of section 40 of the Law of Property Act, seems to ignore the definition of 'land' in that Act; moreover, in the chapter entitled 'Preliminary Inquiries', it is not always clear whether a suggested inquiry should be made before or after the contract. These comments, however, are not intended to bear any derogatory implication: it is a book that one is glad to have.

S. J. B.

Rediscovery of Justice. By F. R. Bienenfeld. [London: George Allen & Unwin, Ltd. 1947. 263 pp. 15s. net.]

This is a scholarly and interesting contribution, refreshing in its novelty of approach, to the theory of justice and natural law. The author combines a clear grasp of legal philosophy with a bold use of some psycho-analytical explanations of legal phenomena. Moreover, the object of the book is not purely theoretical. For much of what the learned author says is related to the practical and topical problem of an International Bill of Rights. He discusses the matter, in a spirit of cautious optimism, from the point of view of a Minimum Bill of Rights with regard to which he makes detailed proposals. The section expounding the author's theory of the relativity of natural law, and Part III on 'Natural Law in its Evolution', are of particular interest.

H. L.

Commento a Tocqueville 'L'idea dei diritti'. By Gino Gorla. [Milan: Giuffre. 1948. 345 pp. Lire 770.]

This volume consists of two parts which, at first sight, may appear somewhat disconnected. The first surveys in legal terms the development of individual liberty in jurisprudential thought. Here the author traces the feudal concept of personal liberty and its place in natural law. Neither of these two concepts relies on any ulterior source or justification. He then turns to modern theories which derive individual liberty and all individual rights from the legislative power of the State. In particular, Jellinek's doctrine of 'personal rights of a public law nature' are discussed at some length. The second part analyses Tocqueville's views on the same subject. This part which is largely historical and sociological consisting of extracts from his works and of comments upon them, serves as a useful illustration of the first, but could have been shortened with some profit. In the end a picture emerges which shows that the jurisprudential theories on the nature of individual rights are closely connected with contemporary political and sociological thought. Although the book is mainly devoted to the exposition of Tocqueville's thought, it deserves attention for the new method which is employed in developing a problem of jurisprudence.

K. L.

Current Legal Problems. Volume 1. Edited by G. W. Keeton and G. Schwarzenberger. [London: Stevens & Sons, Ltd. 1948. vii and 246 and (index) 2 pp. 17s. 6d. net.]

The fourteen lectures contained in this volume are a series of public lectures on topical problems of more than a merely technical interest, sponsored by the Faculty of Laws at University College, London, and delivered in 1947–8. Each lecture is a scholarly product of much research, and as considerations of space do not permit of a detailed analysis, we can only list the lectures and their authors, 'Bentham and the Law, 1748–1948', by Professor Jolowicz; 'Legal Responsibility for Political Acts', by Professor Keeton; 'The Frontiers of the Common Law', by Professor Graveson; 'The Making of Everyman and his Undoing', by Richard O'Sullivan, K.C. (parliamentary sovereignty and State control undoing the common law product—Everyman); 'The House of Lords and its Reform', by Mr. Fitzgerald; 'Ministers' Powers and the Courts', by Mr. Lloyd; 'The Prerogative of Mercy', by Mr. Marshall; 'Industrial Relations in Crime and Tort', by Dr. Hanbury; 'La Place de l'Homme dans la construction du Droit International', by Professor de La Pradelle; 'Protection of Human Rights in British State Practice', by Dr.

Schwarzenberger; 'Development and Reform of Chinese Law', by His Excellency Tien-Hsi-Cheng; 'Law and Administration in Present-Day Japan', by Mr. Green; 'Modern Trends in Islamic Law', by Mr. Zagday; 'Mixed Marriages', by Professor Vesey-FitzGerald. We congratulate the Law Faculty of University College upon the high standard of their work and in making these valuable lectures available to the public.

T. E. L.

The Conflict of Laws. By R. H. Graveson, ph.d., s.j.d., ll.m. [London: Sweet & Maxwell, Ltd. and Stevens & Sons. 1948. xxxi and 394 pp. 30s. net.]

Professor Graveson has written a clear, concise and scholarly introduction to the Conflict of Laws. His grounding in the common law and his bent for jurisprudential thought have contributed to produce a book which relies exclusively on the practice of the courts and faces squarely any controversial issues of a theoretical nature which arise so frequently in this subject. It is certain to establish itself as one of the most popular textbooks for the use of students. The Conflict of Law is a fertile source of academic disputes, and Professor Graveson, while anxious to avoid them, has not always been able to achieve this aim. The section on classification, as is to be expected, provides the best example. It may be doubted whether any one case, such as *Ogden* v. *Ogden* [1908] P. 46, is an authority on the classification of matters of consent (p. 33, n. 41) seeing that rules of foreign law must be classified, and that these must be proved as facts. Moreover, the nature and function of consent may vary from country to country. It is difficult to follow the author when he states (pp. 38, 338) that the rule in *Machado* v. *Fontes* sanctions 'cumulative or double classification'. Again, it is probably an unfounded generalisation to state that 'until 1886 there had been a general application of the doctrine of renvoi' (p. 47). The author seems to advocate partial (or simple) renvoi, but his view is not quite clear (p. 47). The difficulties arising from a reference back to the national law of a British subject are passed over lightly. In the law relating to the annulment of marriages, the rules concerning capacity to marry and those concerning avoiding a marriage are not sufficiently distinguished (pp. 100, 104) with the result that the principles of choice of law which apply in the latter case are made to apply in the former. The analysis of *De Reneville* v. *De Reneville* [1948] P. 100, is affected by the same confusion (pp. 332, 333). The suggestion that the proper law of the contract alleged to exist must determine whether it has come into existence is valuable. On the other hand the tentative proposition that a contract which is illegal by the *lex loci contractus* will probably not be enforced

in England is still an open question (p. 154). Perhaps a reference to the question what law governs the modalities of payment should have been included. The section on damages for dishonour of a bill of exchange may benefit from a slight expansion. It is a matter for discussion whether enemy status and jurisdictional immunities must be treated in a book such as the present, but subsequent editions may profitably include references to *The Porto Alexandre* [1920] P. 30 (p. 267 (3)) and to Beckett in (1944) 21 B.Y.I.L.34 (p. 267, n. 28a). The statement that the *lex fori* determines according to its own law whether any alleged party has or has not existence (p. 276) is open to criticism especially where corporations are involved. Although jurisdiction in matters of bankruptcy is based on the Act of 1914, it still remains necessary to take into account *Cooke* v. *Chas. A. Vogeler Co.* [1901] A.C. 102 and *Re Debtors* [1936] Ch. 622. But these are minor blemishes in a book which ranges in less than 400 pages over the entire field of the conflict of laws and does so with conspicuous success.

K. L.

The Conflict of Laws. A Comparative Study. By Ernst Rabel. Vol. 2. Michigan University Press. [London : Geoffrey Cumberlege. 1948. xli and 705 pp. 45s. net.]

In this volume Professor Rabel continues his comparative examination of the world's systems of the Conflict of Laws with special reference to the Restatement and American practice. The general characteristics of this treatise were discussed elsewhere ((1946) 23 B.Y.I.L., p. 513) after the first volume had been published. The second volume which treats of corporations, tort and the general principles of contract displays the same breadth of learning and robust common sense. The section on corporations (which includes unincorporated associations of all types) has reached a degree of completeness that has probably never been obtained before. The author's own conclusions involve an interesting combination of the doctrines accepted in common and civil law countries, while avoiding recourse to meaningless connecting factors and irrelevant branches of the law, such as tax law and the law of nationality. It is impossible to enumerate the many points discussed in this connection but the observations on the power of corporations and their agents deserve special mention. Completeness is once more the salient feature in the section on tort. While research in this field cannot yield any startling results, it has been possible for the author to throw light upon a great number of problems (among them causation and fault, contributory negligence, parties) many of which have scarcely been noticed in this country. The analysis of *Machado* v. *Fontes* [1897] 2 Q.B. 231, must be regarded as

final. The modern trend towards a greater diversity of rules is apparent in the suggestion that the place where the wrong is committed may differ according to the nature of the tort.

The general principles of the law of contract are presented in a form which is masterly in its detached clarity. Free choice of law, subsidiary tests, incorporation of foreign law and public policy are all discussed at great length. The final conclusions in favour of free choice supplemented by separate rules for different types of contracts and against the splitting up of individual contracts are both practical and in accordance with recent tendencies. While it is impossible to single out specific topics, attention may be drawn to the novel interpretation of *Ralli Bros.* v. *Compañia Naviera Sota y Aznar* [1920] 2 K.B. 287, 304 and *The Torni* [1932] P. 78, as well as of *Vita Food Products, Inc.* v. *Unus Shipping Co.* [1939] A.C. 277. The latter is discussed in the light of previous American decisions which give more substance to the somewhat loose criteria laid down by the Judicial Committee of the Privy Council in order to bridle an unlimited exercise of free choice of law. Finally, in the chapter on public policy, Professor Rabel rightly draws attention to the confusion due to the overlapping of the public policy proper of the *lex fori* and rules of public law, chiefly in the nature of administrative law, of the *lex fori* and the *lex causæ*. The latter rules should not be allowed extra-territorial effect.

The new volume, like its forerunner, is a valuable contribution to the study of the Conflict of Laws. Moreover, it is to even a greater extent than its forerunner an outstanding example of the value of the comparative method where technical problems rather than national institutions are under review. Legal theory may divide, but the work of the courts tends towards uniformity. Every work which brings the world's legal systems nearer to each other is welcome, and the present work is outstanding among them.

K. Lipstein.

The British Year Book of International Law, 1946. Vol. 23. Edited by Professor H. Lauterpacht. [London: Geoffrey Cumberlege (Oxford University Press). 1947. vii and 535 pp. 42s. net.]

When the first volume of this *Year Book* appeared after the Second World War it was evident that the high standard of the pre-war years had been maintained. The present volume is no exception, but certain changes begin to appear. In the first place, the size of the volume is considerably increased. In the second place, the contributions are mainly concerned with topical questions, principally with those concerning international organisation.

The Charter of the United Nations is examined by Pollux, Professor Brierly and Professor Wortley, who discuss in turn its interpretation, its relation to the Covenant and the Veto and Security Provisions. The Second World War and its aftermath form the subject of articles by Professor Smith on Booty, by Mr. Rowson on Italian Prize Law, by Dr. Schwelt on Crimes against Humanity, by Mr. R. Y. Jennings on Government in Commission, and by Dr. Robertson on UNRRA. The law of peace, history and theory take second place, but the contributions by Professor Lauterpacht on the Grotian Tradition in International Law and by Mr. Lyons on the Conclusiveness of Foreign Office Certificates are of considerable importance. Questions of Private International Law are discussed by Mr. Bathurst and Mr. Fawcett, whose survey of English decisions combines lucid exposition with robust criticism.

In the third place, the *Year Book* now provides a documentary section compiled by Mr. Parry. This section is particularly valuable for its systematic arrangement which is accompanied by introductory comments. Notes on topical questions and extensive book reviews complete this volume. Although its contents concern predominantly matters of topical interest, the scholarly character of all contributions assures this volume a lasting place in the literature of international law.

K. L.

The Law and Custom of the Sea. By H. A. Smith, Emeritus Professor of International Law in the University of London. [London: Stevens & Sons, Ltd. 1948. x and 193 pp. 12s. 6d. net.]

This admirable introduction to the international law of the sea has been written by Professor H. A. Smith for the use of officers of the Royal Navy and the Merchant Marine. It is difficult to imagine how this task could have been better performed. The author is unusually well equipped for this purpose because many years of experience as a lecturer at the Royal Naval War and Staff Colleges have given him a unique knowledge of the practical aspects of the problems which seamen have to face both in peace and in war. Professor Smith observes, very truly, in his preface that the standard works on international law are of little use to the seafarer. 'The lawyer goes to a book in order to find material for arguing a case: the serving officer wants to be told what to do.' For this reason the book contains very few references to authorities and historical discussion has been reduced to a minimum. Herein lurks a possible source of danger. The international law of war, in particular, does not always lend itself to statement in a concise and definite form. The precise

application of a settled rule may often depend on considerations of high policy. Bearing this in mind we have made certain tests and these indicate that, where the solution of a problem is in doubt, the author is careful to indicate that any opinion which he may express is not conclusive and that there are other points of view. This little book must, perhaps, be classified as an elementary work but it is surprisingly comprehensive and there can be no doubt of its adequacy for the purpose for which it is designed. But it will also be of value to lawyers and others seeking for information as to the latest developments in the international law of the sea. It is a readable book in the best sense of the word, combining—as it does—lucidity and charm of style with a full understanding of the needs of the readers for whom it has been written.

H. C. G.

A Textbook of International Law. By Alf Ross, ll.d., ph.d. [London : Longmans, Green & Co. 1947. 313 pp. 21s. net.]

The growing complexity of international law and the constant addition to case law and specialised literature make a comprehensive view of international law increasingly difficult. A textbook which stresses the systematic approach is a welcome antidote. If the author makes, in addition, a contribution to the general theory of international law, he cannot fail to rouse interest and to stimulate thought. This is what Professor Ross has done in his short textbook. Starting from the proposition that international law is not based upon the agreement of States but on general overriding principles, the nature of which he does not discuss in detail but which seem to rest on a sociological interpretation of law, he argues that the current definition runs in a circle. Instead, international law is 'the law binding upon selfgoverning communities'. This leads him, however, to difficulties when dealing with Federal States and certain international organisations. International law differs from municipal law in its content, and not in its source. Professor Ross is a dualist, and he applies the dualist doctrine throughout the book. For him international law is a system which addresses itself to a limited number of subjects. Individuals can be given rights, but they are bound by duties only in virtue of municipal law which may be carrying out a mandatory or permissive direction of international law. Recognition is declaratory, but inasmuch as it signifies the normal assumption of diplomatic relations, it is discretionary. The chapters on nationality and the status of aliens, which are usually packed with details of a more or less ephemeral kind, are here adroitly worked into the logical pattern. The remaining chapters which discuss technical matters are accurate and clear, but the author's

views are not infrequently somewhat unorthodox. Thus in his treatment of state responsibility he introduces a new terminology, if not new distinctions. He admits that some disputes are non-justiciable, but it is doubtful whether his advice to draw up a catalogue of legal disputes can be carried out. He believes that the International Court of Justice when dealing with a political dispute is empowered to decide *ex aequo et bono*, and he expresses surprise that art. 36 of the statute of the court does not include 'the existence of facts creating, amending or abolishing rights'. The reader may disagree with these and other suggestions and observations, but no student of international law can fail to be fascinated by this thought-provoking and scholarly book.

K. Lipstein.

International Court of Justice Year Book 1947–1948. [Leyden: (H.M. Stationery Office). 1948. 158 pp.]

This is the second year book published by the Registrar of the International Court of Justice, and it covers the period from July 16, 1947 to July 15, 1948. It is of course an indispensable source for information on the organisation, personnel, jurisdiction and activities of the court. It includes a digest of decisions applying to particular articles of the statute or to rules of the court, an analysis of instruments of all kinds relating to the jurisdiction of the court, and a comprehensive and well arranged bibliography. The present number also has short summaries of the judgment in the *Corfu Channel Case* (*Preliminary Objection*), and of the advisory opinion on the admission of new members to the United Nations.

R. Y. J.

Wirtschafts Kongessionen bei Änderung der Staatshoheit. By Hermann Mosler. [Stuttgart: Kohlhammer. 1948. 256 pp. Dm.18.]

This scholarly treatise on the effect of State Succession upon concessions has filled a gap in the literature on international law. The author rightly perceives that the question must be treated from two points of view. First, it involves an examination of the doctrine of acquired rights. Second, it involves an examination of the liability of successor States for the debts of the predecessor State. A combination of the answers given to these two questions provides the solution of the problem under review. The author relies strongly upon the practice of international tribunals and municipal courts, and the result is an extensive monograph of high quality.

K. L.

The Process of International Arbitration. By KENNETH S. CARLSTON. Columbia University Press. [London : Geoffrey Cumberlege. 1946. xiv and 318 pp. 25s. net.]

CONSIDERING the long history of international arbitration, it is surprising that the actual technique of it, as opposed to the substantive law to be applied, has received so little attention from the writers. The contribution of the United States to the development of arbitration is second to none, and it is appropriate, therefore, that this very competent study of the principles involved in the functioning of international courts is from the pen of a professor at Illinois University. Professor Carlston succeeds admirably in the very difficult task of deducing general principles from the very scattered and diverse materials. He deals comprehensively with such matters as procedure, jurisdiction, essential error, finality of awards, and rehearing and appeals. An immense amount of scholarly labour has gone into the work. Its great strength is in the careful analysis of a large number of cases (there are a hundred and seventy-seven of them in the case list), every one of which has been carefully studied from materials not generally available. It also contains many practical suggestions which are the product not merely of book-learning but also of the author's own experience as an attorney in mixed claims commissions. The slightly disappointing side of the work is where it touches on the broad issues of jurisprudence which are so important in attempting to assess the place of arbitration in an international society. For example, in the final chapter on the future of arbitration one would have welcomed Professor Carlston's views on the important and controversial question of justiciable and non-justiciable disputes. One was also slightly shocked to read (p. 158) that unless an arbitrator has been given the power of an *amiable compositeur*, it is his duty to pronounce a *non liquet* 'whenever the absence of law or the impossibility of legal analogy and reasoning force him to his personal conception of justice as the only basis of decision'. This is to make bold assumptions on very controversial issues without indicating that there is a school of thought which would take a very different line on the question of so-called gaps in the law and the permissibility of the *non liquet*. One is confirmed in the surmise that Professor Carlston has perhaps skimmed a little too lightly over some of these fundamental problems by the striking omission in a very extensive bibliography of any reference to Professor Lauterpacht's *Function of Law in the International Community* which is the best known work on these very problems.

R. Y. J.

The Jurisprudence of Interests. Selected writings of Max Rümelin, Philipp Heck, Paul Oertmann, Heinrich Stoll, Julius Binder, Hermann Isay. Translated and edited by M. Magdalena Schoch, with an Introduction by Lon L. Fuller. *Twentieth-Century Legal Philosophy Series : Vol. II.* [Harvard University Press. London : Geoffrey Cumberlege (Oxford University Press). xxxii and 328 pp. $5.00. English price, 27s. 6d. net.]

The avowed purpose of a Jurisprudence of Interests is to serve the practical ends for which the law exists, namely, the solution of legal problems. Thus we have Philipp Heck (p. 31) 'It aims at finding those principles which judges should follow in deciding cases, and, therefore, is important not only for judges but for all legal scholars who wish to assist judges in this function'; and again (p. 32), 'The Jurisprudence of Interests in a narrower sense may be defined as that form of modern legal thinking which places special emphasis on the above-mentioned maxim of analysis of interests or theory of conflicts'. The basic idea, therefore, is really simple, and consists of paying regard to the sociological purpose of the law.

Philipp Heck, who may be regarded as the principal contributor, expands his thesis, quoted above, by insisting on the need for concentrating on practical issues and on compromise as the central problem of society. At p. 107 he discusses the tasks with which such a jurisprudence is faced. He does not go to the extreme of rejecting abstract legal concepts altogether and admits that they are useful. At p. 33, where he begins his subject, he says, 'viewed as a whole, the legal order consists of commands', but commands affect social life, and here interests compete with one another. The definition of the vital word 'interest' comes rather as an anti-climax, for we are told that the term is employed 'in its widest connotation, as embracing all things that man holds dear, and all ideals which guide man's life. It is only in this meaning that the term is useful in legal science'. It is questionable whether this is a sound basis for the imposing structure which he seeks to erect.

The purpose of the publication is to set out the views of this school, whether the contributors agree with each other or not. Paul Oertmann criticises Heck, and Heck criticises Oertmann. The latter stresses the need for bold statements of principle, at least for the benefit of students, illustrating this with a vivid example of a letter from a student (p. 78). Heinrich Stoll also seems to be more in favour of concepts than Heck, and both these latter writers think that Heck goes too far. Julius Binder refers to the value of a jurisprudence of interests in bringing legal method into conformity with the demands of the age, a question which

has some bearing on the reform of obsolete statutes. Finally, Hermann Isay appears to reject the whole subject. He concludes (p. 315) 'that there is no such thing as a method of Interest Jurisprudence, and that consequently the entire controversy, in so far as it is a methodological controversy, has no object whatsoever'. One has the feeling that he should have been allowed to make this remark earlier. At p. 316 he points out the weakness of Heck's notion of 'interest'.

It is submitted that the value of the book is greatly reduced by these contradictions. For one thing, the writers do not always seem to have the same idea of 'conceptualism'. A reader has first to reconcile the views of the authors before adapting his own ideas. It is doubtful if he will succeed in surmounting the first obstacle. The result seems to be that a person interested in sociological jurisprudence does not find that the book has carried him very far: it destroys itself too much. The book has a greater interest for American readers than English readers in view of the resemblances that are pointed out between the German and American development of the Interest schools. Finally, tribute must be paid to the translator and editor, who has discharged a difficult task carefully and well.

R. W. M. D.

Théorie Générale du Droit. By J. Haesaert, Professeur de l'Université de Gand. [Bruxelles: Emile Bruylant. 1948. 497 pp. 560 francs.]

This formidable volume is of a sort which is unfamiliar to the average English student; and in this *Journal* it will be better to note the author's purpose than to discuss his performance. 'A general theory of law,' he says in the Introduction, 'is concerned with the study of the intrinsic conditions of the phenomenon we call the juridical. By intrinsic conditions are meant those necessary conditions without which the relevant object no longer exists as such. We do not here refer to the intrinsic conditions of a *particular* juridical system, but to those of the juridical in itself, disengaged from all contingencies of time and place. . . . Our definition limits the general theory of law to three main problems: (a) in what consists the specific characteristic of the juridical phenomenon, (b) what is the cause or origin of this phenomenon, (c) how does it realise itself in society. Our subject-matter therefore is the definition, the aetiology and the realisation of the juridical.'

The author finally defines (p. 195) the juridical, if an attempted translation is not too rash, as 'an organisation of human synergies according to a mental bias of the parties who give to it an unconditionally obligatory character reinforced by the relevant

social community'. His other two questions do not receive answers which can be similarly summarised. The author claims to be a positivist and so to 'exclude all fantasy'; whilst most others and particularly the philosophers, in his opinion, are merely subjectivists who attempt a purely psychological adaptation to the problems of life and of law.

The text runs to 462 royal octavo pages. There is an imposing bibliography. The work of most Continental writers dealing with this subject now or in the relatively recent past is reviewed or noticed. English and even American authors are, as it would be supposed, rarely cited; but it may surprise the English reader to find that when he is referred to an English textbook he will, as likely as not, be referred to 'B. R. Wise, Outlines of Jurisprudence for the Use of Students, 1930' which, to the students, is better known as 'Wise and Winfield'.

C. J. H.

Immunities and Privileges of International Officials. The Experience of the League of Nations. By Martin Hill. Published by the Carnegie Endowment for International Peace. $2.50.

Mr. Hill's work is of great value in that it breaks entirely new ground and makes readily accessible a selection of documents concerning the immunities and privileges of the League of Nations officials and of officials of the United Nations and the Specialised Agencies. As the book was prepared for publication about 1946, the documents referring to the United Nations and the Specialised Agencies are necessarily incomplete, and the last chapter of the book dealing with 'The Bases of the Post War Regime' is the least satisfactory. There is, for example, no detailed consideration of the question of the unification of the privileges and immunities of the Specialised Agencies which came up as an item on the agenda of the Second Regular Session of the General Assembly of the United Nations and was considered by the Sixth Committee.

This work should, however, prove of great assistance not only to those who are immediately concerned with the problems which arise in connection with the United Nations and the Specialised Agencies, but also as a contribution to that specialised field of international law which covers diplomatic privileges and immunities.

The experience of the League of Nations in interpreting art. 7 (4) of the covenant which provides that 'Representatives of the Members of the League and officials of the League when engaged on the business of the League shall enjoy diplomatic privileges and immunities' is of particular value in connection with three issues which arise today in any consideration of diplomatic

privileges and immunities. These issues are: What privileges and immunities, if any, are to be granted to subordinate officials; what degree of privileges and immunities can be claimed on behalf of nationals of the Receiving State; and, if the doctrine of exterritoriality is to be discarded, on what basis privileges and immunities granted to diplomatic representatives and the officials of international organisations are to be justified. On all these problems Mr. Hill's book throws light and he has recorded in a most readable form the working of the regime based on the agreements of 1921 and 1928 between Switzerland and the League of Nations and the agreement of 1928 with the Netherlands in respect of the judges and officials of the Permanent Court of International Justice.

JOYCE GUTTERIDGE.

Latin-American Legal Philosophy. By LUIS RECASÉNS SICHES, CARLOS COSSIO, JUAN LLAMBÍAS DE AZEVEDO, EDUARDO GARCÍA MÁYNEZ. Translated by GORDON IRELAND, MILTON R. KONVITZ, MIGUEL A. DE CAPRILES and JORGE ROBERTO HAYZUS, with an Introduction by JOSEF L. KUNZ. *Twentieth-Century Legal Philosophy Series: Vol. III.* [Harvard University Press. London: Geoffrey Cumberlege (Oxford University Press). xxxvii and 557 pp. $6.00. English price, 32s. 6d. net.]

THE Association of American Law Schools has given us a comprehensive survey of Latin-American legal philosophy. It may be questioned whether it is a service or a disservice to erect the patterns of human conduct that we call 'Law' into an abstract philosophy. In any case, if this is undertaken at all, there is always the danger of allowing language forms to impede progress. This raises much wider issues how far purely verbal creations have been glorified as philosophies.

The Latin-American legal philosophers have been content to take over the ideas of European philosophers and elaborate them with modifications and additions. In following these lines of thought the authors have passed from one objectified abstraction to another, leaving behind them a welter of terminology. Husserl's 'essence', for instance (εἶδος), which is independent of human consciousness and is discoverable by intuition, is the basis for the 'Eidetics of Law'. When one tries seriously to reduce the arguments and conclusions to understandable propositions of practical action, the more elusive do they become. Legal philosophy is of respectable antiquity, but one does wonder whether the ingenuity expended on it has been worth while. In

the philosophical sphere the book is undoubtedly an important contribution. Its value in England will be limited since the philosophical approach to law has not gained wide acceptance.

R. W. M. D.

Stipulations for a Third Party. By Gilbert W. F. Dold, m.a., b.c.l.(Oxon), ll.b.(Lond.), etc. [London : Stevens & Sons, Ltd. 1948. xxii and 144 pp. 25s. net.]

This book, of which the subtitle is 'A comparative study with special reference to Continental Law', may fairly be described as an average Continental 'thèse de doctorat'. It is, however, so unusual to have any comparative study published in the English language that it deserves a welcome here.

The subject-matter of the thesis has been much canvassed abroad as is shown by Mr. Dold's extensive bibliography, which however does not mention Ronald F. Roxburgh's (as he then was) 'International Conventions and Third States' (Longmans, Green, 1917). This study does not perhaps extend our knowledge of the subject, but Part I contains an interesting account of the juristic nature of third party stipulations and of their historical development on the Continent and Part II collects various code enactments as well as somewhat cursory references to American, English, Indian, Roman-Dutch and Scots law.

C. J. H.

General Principles of Criminal Law. By Jerome Hall, Professor of Law, Indiana University. [Indianapolis : The Bobbs-Merrill Co. 1947. x and 618 pp.]

The object of this note is merely to call the attention of the student to the existence of a book which has been enthusiastically reviewed elsewhere. The book is of special interest to the academic student. It is a valuable corrective of the tendency to treat the criminal law as a jumble of uncorrelated 'bits and pieces' and may well become a classic. Though of an amplitude which is in English legal writings unusual, the inquiries into attempts, *mens rea* and insanity are specially to be commended.

C. J. H.

The Government of Canada. By Robert MacGregor Dawson. [Toronto : University of Toronto Press. 1947. London : Oxford University Press. 1948. x and 622 pp. $5.50 net.]

In this book the Professor of Political Economy at the University of Toronto gives a useful and readable account of Canada's

constitutional and political machinery. He addresses himself to the general reader and, though much concerned with constitutional law, steers clear of strictly legal problems. Two sections are devoted to the general principles of the Federal Constitution. The Executive (Governor-General and Cabinet), Administration (Civil Service), Legislature and Judiciary are then each treated in turn. A final section gives a lively account of the organisation and activities of the various political parties.

The Federal Government is the author's main concern, and comparatively little space is given to provincial affairs or to dominion-provincial relations. English readers will therefore find that almost the whole book is of comparative interest. Responsible government in Canada has been developed out of the same conflicting interests as in England, within the framework of a legal constitution which is silent on the subject. Civil liberties also rest on a mainly tacit foundation—though not, in Professor Dawson's opinion, such a secure one as in England, owing to a relatively less vigorous hostility to encroachments. There is therefore some feeling in favour of constitutional guarantees on the American model. The rule of law, as transplanted to Canada, is explained with the confidence and accuracy which the subject inspires so readily (and so properly) in all except, alas, constitutional lawyers.

Professor Dawson's readers will be grateful for his robust and agreeable style, and for the clarity with which he has arranged his material. His book will be especially useful to English students who wish to be able to refer to a simple and clear statement of the Canadian attitude to the many constitutional questions which both countries have to face.

H. R. W.

Criminal Procedure from Arrest to Appeal. By Lester Bernhardt Orfield, Professor of Law, Temple University. [New York University Press. London: Geoffrey Cumberlege. 1947. xxxi and 614 pp. 30s. net.]

This is one of a series of books on Judicial Administration. 'Each volume in the series aims to trace the history of its subject, to sketch the law as it now is and then to set up sound standards of practical reform for the guidance of the judicial councils of the several States and such other groups, official or private, as may interest themselves in the vital problems of the administration of justice' (Foreword, p. ix). The description of the law requires consideration of both State and federal provisions, with English law and practice for comparison. It is a practical book, aiming at producing a body of rules that ought to be generally acceptable in all jurisdictions. The English reader who is interested in the

administration of criminal law in America will find this book admirably clear and suitable for his needs. It may however be a somewhat dangerous book for an English lawyer, for it may fill him with conceit. What a fuss and bother there does seem to be : two or more days spent in challenges to the jury (p. 355), whilst in England challenges are so rare that many experienced practitioners have never known an instance. Look at p. 491 and see the recommendations of the American Bar Association as to conduct that should not be allowed during a trial, much of it conduct that would here be visited by stiff penalties for contempt of court. The reader must be strong-minded and regard complacency as the real mark of the devil. The question is the same in both systems : Why are abuses tolerated? The Foreword to this book (by Arthur T. Vanderbilt) suggests that the public attitude is responsible : criminal lawyers are rated lower than civil lawyers, judges of criminal courts are paid less than judges of civil courts, and law students regard criminal procedure as an inferior subject. He points out in contrast that in England the Lord Chief Justice spends part of his time in taking criminal trials and that leaders of the Bar are as much at home in criminal cases as in civil.

Ought we to teach criminal procedure in our law schools ? I think not as a separate subject. With us it forms part of the history of criminal administration, dovetailed into the substantive law and methods of treatment. The material is more in Parliamentary Papers than in law books. Professor Orfield is in a different position; it is comparative law for him, and with this authoritative textbook one can see the various rules of the different jurisdictions expounded with careful scholarship. Surely that is a study which cannot be neglected.

R. M. J.

Lawyers, Law Schools, and the Public Service. By Esther Lucile Brown. [New York: Russell Sage Foundation. 1948. 258 pp. (no index). $3.00.]

The theme of Miss Brown's book may well be summed up in a quotation on pp. 108–109 from an article by Professors H. D. Lasswell and Myers S. McDougal of the Yale Law School ('Legal Education and Public Policy : Professional Training in the Public Interest' (1943) 52 Y.L.J., p. 206) :—

> 'If legal education in the contemporary world is adequately to serve the needs of a free and productive commonwealth, it must be conscious, efficient, and systematic *training for policy-making*'.

After two very interesting surveys of the 'Important Role played by Lawyers in Official Positions' and the 'Nature of the work done

by Lawyers in Federal Agencies', Miss Brown turns to her third and main section which is entitled 'Implications for Legal Education'. Here she describes the efforts which are being made to fashion courses of instruction in American law schools which will realise the aim of legal education which is outlined in the quotation given above. Some of the changes need little justification, for example, the reconsideration of the place of real property in the legal curriculum. But when it comes to wholesale reorganisation of the kind which has apparently taken place at Northwestern, the ranks of Tuscany stop cheering.

> 'Three required courses of the second year on corporate relations, employment relations, and competitive and consumer relations, are designed to broaden the base of legal preparation for dealing with industrial problems, and to guarantee that the student shall be oriented not only in corporate structure and function, but in management-labor relationships, and in questions of fair competition and protection of consumers' interests. A required seminar, given concurrently with the three courses in relations, examines particular industries from the point of view of their corporate organisation, financing, labor relations, competitive relations, trade association activities, and price and wage policies.'

Miss Brown finds it particularly gratifying that the third year curriculum includes 'seminars on agriculture, and health and the general welfare', and sums up the position at Northwestern in the following words (pp. 105–106):—

> 'The program is based on the assumption that the task of most of its graduates will be largely one of formulating policy whether for industry, business, industrialised farming, unionised labor, or government, and that policy will be made more frequently by the lawyer in the role of counselor than that of advocate'.

Here it is necessary to take a deep breath and obey the familiar American maxim 'Stop, look and listen'. With a law school course as outlined above we have practically reached the stage of Hamlet without the Prince, for the Law School teaches precious little law. We are aware in this country of the almost 'unprofessional' role of the lawyer in American public and business life, a phenomenon for which there are many reasons. This position is reflected in the number of law schools throughout the United States and the number of law students, and many of those law schools have tended in the past, and many doubtless still do tend, to be mere factories for turning out legal technicians. But the reforms suggested represent the swing of the pendulum to the opposite extreme; they carry the implications of the Brandeis Brief in *Muller* v. *Oregon* to a logical extreme, with the absurdities which often characterise logical extremes. In fact the basic theme

of the suggested reforms recalls the Platonic paradox—that government will never be good until Philosophers become Kings or Kings become Philosophers. Miss Brown apparently would have it that a plain lawyer is worse than useless; what is needed is a blend of the sociologist, the economist and the anthropologist with a slight legal flavouring.

Basically the problem is the old one of a broad general education for the professional specialist. Apparently the general education to be obtained at American colleges in the A.B. course (which normally precedes admission to a graduate law school) is not broad enough and therefore 'broadening subjects' must be introduced into the graduate course. It does not need the gift of prophecy to foresee the strong probability that such courses will produce a superficial knowledge of the broad general subjects and no real working knowledge of the tools of the profession. There may well be a need for graduate schools in Public Administration. If so, the proper course would seem to be to build up new institutions designed for the purpose, not to pour new wine of rather doubtful quality into the old law school bottle.

D. W. Logan.

Lectures on the Town and Country Planning Act, 1947. By R. E. Megarry, M.A., LL.B., Barrister-at-Law. [London : Stevens & Sons, Ltd. 1949. x and 124 pp. 9s. 6d. net.]

The Town and Country Planning Act, 1947, with the subordinate legislation made under it, is probably the most formidable Act on the Statute Book. Solicitors must know many of its provisions, and great activity has been shown by the profession in organising and attending lectures on the new law. Mr. Megarry has lectured all over the country, and now we have his lectures in book form. The origin of the book explains both its form and its method of approach. The attitude is in substance this : a new set of obstacles has been created, and the new obstacles are quite horrid; so let us look at them with a keen professional eye for any weakness. The Minister and the local planning authority are powers that take 'hostile action' (p. 101). There is no attempt to explain what the Act is meant to achieve. In this book the Act means development control, compulsory acquisition and the Central Land Board : the horrors and not the constructive work. Perhaps this is why the author suggests (p. 5) that planning authorities can delegate their functions to county districts without explaining that they cannot delegate their main duties. The point is that Mr. Megarry is addressing professional men who must look after their clients' affairs, and as professional men it is the obstacles that they must study. They want to know what are the things that their clients

will be up against: when the hostile power advances can you fight, or can you take evasive action, or negotiate, or is it surrender? And do not raise false hopes: always speak of the share-out of the £300 million as if it is bound to give no more than a paltry dividend. Understand the genesis of this book, and it appears a brilliant piece of work—a lucid, well arranged and striking exposition of complex legislation.

R. M. J.

The Town and Country Planning Act, 1947. By H. A. Hill, M.A., of Gray's Inn, Barrister-at-Law, and D. P. Kerrigan, B.L. (Edin.), of the Middle Temple, Barrister-at-Law. [London: Butterworth & Co. (Publishers) Ltd. 1948. 318 pp. 25s. net.]

Supplement to Hill and Kerrigan on the Town and Country Planning Act, 1947. By D. P. Kerrigan, B.L.(Edin.), of the Middle Temple, Barrister-at-Law. With Conveyancing Precedents by Edmond H. Bodkin, B.A., of Lincoln's Inn, Barrister-at-Law. [London: Butterworth & Co. (Publishers), Ltd. 1949. viii and 231 pp. 17s. 6d. net. Main work and supplement, 37s. 6d. net.]

The main work, reprinted from Butterworth's Annotated Legislation Service, was already in the press when the Minister named the 'appointed day'. It consists therefore in the main of an introduction, and an annotated text of the Act. The supplement however is designed, by means of a noter-up, to bring the work up to date to October 31, 1948, and to give an annotated text of the many statutory instruments which have endeavoured to clothe with paper the bare bones of the Act.

The two volumes together are most comprehensive, and form probably the most useful of the works so far published on the Act. The chief defect is the perfunctory nature of many of the annotations, due largely to the fact that the main work was published before many of the difficulties had emerged, and to the unsuitability of a 'noter-up' for elaborate comment. If a further edition is contemplated, reference might be made to appropriate articles in *The Journal of Planning Law* on matters of which lack of space forbids the detailed consideration, *e.g.*, the extent of the Central Land Board's powers of acquisition under section 43, and the misprint in section 91 (4) (*a*).

The precedents in the supplement will be particularly interesting and helpful to conveyancers. The elaboration of satisfactory precedents is a slow and gradual process, though the special condition relating to matters under the Act recently added

to The Law Society's form of contract sets a high standard. Mr. Bodkin's forms are perhaps from a long-term point of view excessively concerned with the assignment of claims under Part 6 of the Act, but these claims are for the time being of considerable conveyancing importance. He does not give his views on the difficult question of whether it is possible to assign such claims on a sale of settled land, and, if so, who should be parties to the assignment.

The suggested form of statutory declaration is concerned only with use, but it is of equal importance to a purchaser to be satisfied that no unauthorised 'operation' has been carried out. The first clause suggested for insertion in contracts is similarly limited.

G. A. Grove.

Outlines of Industrial Law. By Mansfield Cooper. [London: Butterworth & Co. (Publishers), Ltd. 344 pp. 21s. net., by post 1s. extra.]

In this book published in 1947, Mr. Mansfield Cooper, who is Registrar of the University of Manchester and Senior Lecturer in the Faculty of Law in that University, has presented a lucid and well-written description of the evolution of the law in relation to industry. Indeed the title might well have been the development of industrial law. Beginning with the formation and discharge of the contract of service, the contract of apprenticeship, and the relation of master and servant with third parties, the book proceeds to a description of industrial legislation, the master's liability for injury and the National Insurance (Industrial Injuries) Act, 1946, and concludes with the law of trade unions and emergency legislation. The Tables of Statutes and Cases and the Index are full and valuable for reference purposes. Full weight is given to the influence of the common law and the historical review in each section makes the book equally useful to the student of social history and the teacher and student of law.

Industrial legislation, already complex, has, as a result of the emergency measures of the war years and the continuing nationalisation of industry, assumed truly formidable proportions. No single manual can hope to encompass the subject but Mr. Cooper has, by careful selection and the broad historical approach, laid down the principles to which, as he says, later statutory developments can be related.

There is one aspect of the subject which does not perhaps receive quite the attention it deserves and that concerns the welfare of the worker. The law relating to Public Health is, of course, a separate subject but sections relating to industrial welfare and

the special hazards of industry form an important part of present-day industrial legislation. So important is this that it might well merit a separate chapter.

This book will be of great assistance to both teacher and student.

A. Leslie Banks.

The Principles of Planning Law. By J. Charlesworth, ll.d. Second edition. [London: Stevens & Sons, Ltd. 1948. xvi and 164 pp. 12s. 6d. net.]

The first edition of this book appeared in 1946, the object being to give a brief account of planning law as a whole. The book succeeded. Now the Town and Country Planning Act, 1947, has made a new edition necessary, and inevitably the new edition is a new book; only one chapter (that on housing) survives from the earlier edition. Dr. Charlesworth had a difficult task. The chief trouble is to keep the main lines clear and to resist the temptation to go into details, although here the author has perhaps been helped by the fact that he wrote the book before the mass of subordinate legislation had been made. The Town and Country Planning Act, 1947, is a singularly difficult statute to explain. A substantial part of the statute is concerned with compulsory acquisition of land, compensation and development value, and these have to be seen against a wide background of previous law and practice. I doubt whether a first rate introductory book can be written until teaching experience shows what are the matters that need emphasis and fuller explanation and what is found to be easily understood. But a start has to be made somewhere, and Dr. Charlesworth has written the most useful book of its kind that I know. If a student finds some headaches, he must console himself with the thought that practitioners have their doubts and worries.

R. M. J.

Factory Law. Fourth edition by H. Samuels, m.a., of the Middle Temple and Northern Circuit, Barrister-at-Law. [London: Stevens & Sons, Ltd. 1948. xii and 653 and (index) 21 pp. 45s. net.]

Previous editions of this work appeared under the title *The Factories Act, 1937*, and the present title aptly describes this complete treatise upon the law relating to factories. Since the third edition, published in 1943, there have been several important additions to this branch of the law both by statute, regulation

and decisions of the courts. The reader will find in the present edition in Appendix 10 the full text of the Factories Act, 1948. There are explanatory notes to each section and it is to be particularly noted that the amendments to the 1937 Act are clearly shown in the text of that Act. There is also included in this edition the Building (Safety, Health and Welfare) Regulations, 1948 (1948, No. 1145) which came into operation on October 1, 1948. These regulations revoke the Building Regulations, 1926 to 1931. Reference, however, to the new regulations has been omitted from the notes to section 107 of the 1937 Act.

Among the recent decisions noted of particular interest are those concerning the fencing of dangerous machinery. *Dennistoun* v. *Greenhill, Ltd.* [1944] 2 All E.R. 434, where it was held that the obligation to fence securely under section 14 of the 1937 Act, was absolute in the absence of any regulations made by the Secretary of State, is one of these decisions, and the House of Lords decision in *Nicholls* v. *Austin (F.) (Leyton), Ltd.* [1946] A.C. 493 is another. It is to be regretted that this edition just missed the recent pronouncement of the House of Lords upon this subject in *Carroll* v. *Andrew Barclay & Sons, Ltd.* [1948] 2 All E.R. 386.

To those who approach this branch of the law for the first time the short Introduction is an excellent guide. One can find there in compendious form the history of factory legislation which is followed by a description of the law as it now is by virtue of the 1937 Act, and subsequent amendments.

Finally, it must be stated that this is a book which no practitioner who has occasion to consult the factory law should be without, and it is a work which would be of great value to all those who administer this branch of the law.

H. G. Talbot.

Exchange and Borrowing Control. By F. C. Howard, M.A., Solicitor of the Supreme Court. [London : Butterworth & Co. (Publishers) Ltd. xx and 257 and (index) 26 pp. 21s. net.]

This book, which is reprinted from Butterworth's Annotated Legislation Service, deals with two quite separate matters. Book I, the major part of the work, consists of an introduction to, and an annotated text of, the Exchange Control Act, 1947, and the relevant Statutory Rules and Orders made thereunder, together with procedural details and forms. Book II is concerned with the Borrowing (Control and Guarantees) Act, 1946, and comprises mainly an introduction to and annotated texts of that Act and the Control of Borrowing Order, 1947. Some other enactments, such as the Defence (Finance) Regulations, 1939, are also dealt with.

The subjects covered, though varied, have one feature in common, namely their dependence upon delegated legislation. The bringing together of this vast mass of rules, orders and regulations is of the greatest assistance, particularly to those practitioners who are not dealing with these matters daily. How necessary some guidance is can quickly be appreciated by a consideration of reg. 6 of the Defence (Finance) Regulations, 1939, of how it achieved its present form, and by what authority it now operates. Any constitutional lawyer seeking a particularly gross example of the evils of delegated legislation should read pp. 197 *et seq.*

The annotations are perhaps principally of use for their references and cross-references, but they do sometimes afford help on the more difficult questions of construction which arise. For instance, when new shares are offered to existing shareholders with a right of renunciation, which is exercised, is it sufficient to comply with s. 8 of the Exchange Control Act, 1947, or must ss. 8 and 9 both be complied with? The author appears to think that s. 9 is applicable, but this view is not universally held.

By the aid of Addenda, the law is stated as at June 1, 1948.

G. A. Grove.

The Transport Act, 1947. By David Karmel, b.a., ll.b. and Richard Beddington, b.a. [London: Butterworth & Co. 1948. vii and 296 pp. 21s. net.]

The Agriculture Act, 1947. By Anthony Cripps, d.s.o., t.d., m.a. [London: Butterworth & Co. 1948. v and 229 pp. 21s. net.]

Both of these volumes are reprinted from Butterworth's Annotated Legislation Service. They are tools of the lawyer, written to meet a professional need. Experience has dictated the form: a full introduction, followed by the text of the legislation with annotation. Armed with *Cripps on Agriculture*, one can go to a hearing, of say, a farm tenant's objection to a notice to quit, and know that one is carrying the legal material in one handy volume (and a supplement to take account of the Agricultural Holdings Act of 1948), and maybe find that others, solicitors, land agents and even the chairman have also had the wisdom to provide themselves with copies. It is like *Stone* in a magistrates' court. If that were all, we could label these books as indispensable to practitioners and of little use to students. But that would be to ignore the Introductions, and they should not be ignored. Transport has thirty-four pages of Introduction, and Agriculture has forty-seven pages, giving a general view of the recent legislation, setting out the earlier position and the aims and methods of the new provisions.

Obviously the organisation of transport and agriculture affect us all, but there is a further interest that I hope students will show. The Transport Commission can be studied as one of the new public corporations, and the County Agricultural Executive Committees appear as an experiment in decentralisation of administration. There is probably no simpler course for a student than going to these Introductions.

R. M. J.

Supplement to Cripps on the Agriculture Act, 1947. By Anthony Cripps, D.S.O., T.D., M.A., of the Middle Temple and Midland Circuit, Barrister-at-Law. [London: Butterworth & Co. (Publishers) Ltd. 1948. viii and 142 and (index) 154 pp. 12s. 6d. net. Price of Main Work and Supplement 30s. net.]

This Supplement is a noter-up to *Cripps on the Agriculture Act, 1947*, and brings the work up to date to October, 1948. It contains all the Statutory Rules and Orders and Statutory Instruments, the text of the Agricultural Holdings Act, 1948, with annotations, together with comparative tables of legislation and a very lucid introduction. The Act of 1947 came into operation on a sectional instalment plan, and one section was 'in operation' but not 'in force'—see footnote p. A.1; this, and the mass of delegated legislation, makes the law on agricultural matters extremely complicated. The pitfalls will be avoided by using this Supplement which is extremely well done.

T. E. L.

A Study of Hospital Administration. By F. Hart and A. J. Waldegrave. [London: Stevens & Sons, Ltd. ix and 184 pp. and (index) 4 pp. 15s. net.]

This book is published under the auspices of the Institute of Public Administration and is described as number one of Studies in Public Administration.

Although the date of publication was 1948 the preface was written in August, 1947, *i.e.*, almost twelve months before the National Health Service Act, 1946, came into operation. The authors, who are the Secretary-Superintendent of a children's hospital and a former Deputy-Comptroller and Accountant-General of the Post Office, set out to present a study of the administration of British hospitals in operation immediately before the changes inaugurated by that Act. They have, therefore, entered a field which has already been the subject of many investigations. Indeed, so searching have been the inquiries in the past thirty years, and in

particular since the passing of the Local Government Act of 1929, that the only justification for further ventures of this kind would seem to be the value of comparison of the old and the new systems. That is precisely what this book does not do. The only chapter concerned with the future consists of sixteen pages devoted almost entirely to an account of voluntary efforts at co-ordination of hospital services in operation in recent years. No attempt is made to describe the organisation of the hospital and specialist services under the National Health Service Act. The only value of the book is, therefore, that of a historical record. Unfortunately the authors have presented their description of the day-to-day administration of a hospital in such a way that quick reference is impossible. Indeed the absence of organised references and the scanty index are serious weaknesses in the book. There is also a tendency to loose writing which is both irritating and confusing. For example, on page 15 what is meant by, 'It is a vital question whether the functioning of a committee, working under scheduled powers and duties delegated by a superior committee, tends more to humanise or officialise the administration of a hospital. Its impact on the staff and the patients operates in both directions and it is impossible to generalise about the net result'.

Much of the knowledge of local government administration appears to have been gained at third hand and the authors do not present a clear picture of the relative responsibilities formerly undertaken by Public Health and Public Assistance Committees in the field of hospital administration. Inevitably the impression is gained of a strong bias in favour of the voluntary hospital system.

As a description of hospital administration in the past this book is interesting, but is of little practical value either to the expert or the student.

A. Leslie Banks.

International Law. By L. Oppenheim. Volume 1. Seventh edition. Edited by H. Lauterpacht. [London: Longmans, Green & Co. 1948. liii and 940 pp. 70s. net.]

This classic of International Law has now reached a seventh edition only little more than a year after the sixth had appeared. Once again Professor Lauterpacht has carried out the heroic task of incorporating the mass of literature which was published in the intervening year. The text has remained substantially the same. Only the sections on International Organisations and Institutions have been cut judiciously and largely re-written. It is superfluous to praise this book; to criticise it would be presumptuous. The reviewer may therefore be permitted to indicate minor details which may require consideration or change.

On p. 134, n. 1 it is stated: 'English courts found originally

that they were not bound to hold that the dissolution of a foreign corporation by a decree of the Government of the State which gave it birth prevents the members or representatives of the dissolved corporation from suing in England. However, in subsequent decisions English courts largely abandoned that view'. This passage tends to mislead. The change indicated in this passage is not one involving rules of English law. These have remained the same. Only in 1925, when *Russian Commercial and Industrial Bank* v. *Comptoir d'Escompte de Mulhouse* [1925] A.C. 112 was decided, the evidence of Russian lawyers showed that banks incorporated in Russia, though in liquidation, had not yet been dissolved. In 1932, when *Lazard Brothers* v. *Midland Bank* [1933] A.C. 289 (not quoted in *Oppenheim*) was decided, it was found as a fact that the Russian banks had since been dissolved. The discrepancy between the decision of the House of Lords in 1925 and that given in 1932 is due to a change in Russian law which is proved as a fact and is not affected by the doctrine of the binding force of precedent. English courts have neither abandoned nor largely abandoned the principle that the law of the place of incorporation governs the evidence and dissolution of a corporation.

The New Zealand Act, No. 38 of 1947, which adopted the Statute of Westminster, should be taken into account in note 1, p. 186. The passage dealing with the immunity of land owned by a foreign State (p. 239, n. 4) is too brief to be helpful. See Niboyet in *Revue générale de droit international public*, 43 (1936), p. 525. The wording of p. 243, note 4 to the effect that State loans floated abroad are not immune from the *lex loci contractus* is not quite fortunate. The view of the House of Lords and of the International Court of Justice is that in determining the law governing such loans the parties may refer or may be presumed to have referred to the foreign *lex loci contractus*. *Comina* v. *Kite* (p. 716, n. 4) was overruled by the United Sections of the Italian Court of Cassation in *De Meeus* v. *Forzano*, *Annual Digest*, 1938–40, Case No. 164. Notwithstanding the opinion expressed in *Chung Chi Cheung* v. *The King* [1939] A.C. 160 and by the editor himself where legation buildings are concerned, the text adheres to the view that a foreign man-of-war is a floating part of foreign territory. Professor Lauterpacht has exercised great restraint in adapting the text to his personal opinions. At times, *e.g.*, in the sections on Grotius and on Recognition this restraint amounts to a self-denial. On the other hand, many sections reflect the results of Professor Lauterpacht's own writings.

On p. 185, n. 3, a reference to *Att.-Gen. for Ontario* v. *Att.-Gen. for Canada* [1947] A.C. 127 and to *Reference Re Privy Council Appeals* [1940] S.C.R. 49 would have been useful. Mr. Jennings' article in (1946) 23 B.Y.I.L., p. 112 might have been

noted on p. 521, and von der Heydte, A.J. 29 (1935), p. 448 could have been referred to on p. 510, n. 3. *Re Fabijan, Annual Digest* 1933–34, Case 156, which contains a particularly clear account of the history of the principle of non-extradition of political offenders, deserves mention on p. 647, n. 1. Finally, three technical questions may be raised. First, the aim to keep the book up to date has led naturally to the inclusion of recent cases as soon as a report has appeared, but it may be desirable in subsequent editions to substitute references to *The Law Reports*, when this is possible (see p. 134, n. 1; p. 262, n. 3; p. 299, n. 2; p. 520, n. 2; p. 548, n. 6). Second, the Index of Cases may require overhauling (see p. 716, n. 2). Third, certain printer's errors have been carried over into the seventh edition (see p. 651, n. 2; p. 786, headnote, last line; p. 841, headnote, last line, read : para. 167 (*o*)).

The new *Oppenheim* has maintained its standard, which cannot be rivalled. The editor can be sure of the gratitude of all students of International Law.

K. Lipstein.

Prideaux's Forms and Precedents in Conveyancing. Twenty-fourth edition. By J. Brook Richardson, m.a., ll.b., of the Middle Temple and Lincoln's Inn, Barrister-at-Law. Volume 1. [London : Stevens & Sons, Ltd. The Solicitors' Law Stationery Society, Ltd. 1948. lxxxvi and 939 pp. 60s. net.]

This is the first of three volumes of the new edition of *Prideaux*, the preface to which is dated June, 1947, and contains contract and conditions of sale, conveyances on sale, exchanges, partitions, extinguishment of manorial incidents and enlargement of term deeds. The date of the preface makes it plain that it makes no attempt to deal with the effects of the Planning Legislation.

In 1913 my then master in the law remarked to me that although *Key & Elphinstone* was a fine, modern and up-to-date set of precedents always to be consulted, I should model my style of drafting upon the older editions of *Prideaux* belonging to the nineties. Unfortunately the 1914 war cut short this apprenticeship to style, but I remember enough of those old forms to wonder what the old editors would think of these modern forms with numbered paragraphs and almost staccato sentences. *Prideaux* will attain its century in three or four years, but it will be a different *Prideaux*. Much of the old language is obsolete as note 3 on page 433 bears witness : ' indenture ', it says, has been out of date since 1845 (but we always used it till 1926) and ' hereditaments ' has become misleading and in this edition ' property ' or

'land' has been substituted therefor. But land can be almost as misleading as hereditaments, indeed much of the prevalent error concerning the effect of the Planning Legislation is due to failure to appreciate that 'land' is never conveyed in any true sense. It is not that I wish to criticise these changes in form as such, but they do represent the burden borne by a modern editor, who tries to keep alive precedents strictly belonging to another age. It is not without significance that *Prideaux* fifty years ago was two volumes, but now it is three, notwithstanding that the number of registered land forms is very few and practitioners are left largely with guidance in the form of notes.

This volume, as its predecessor, has an introductory discursive account of the law beginning with a summary of the 1925 Legislation (pp. 1–67) and the Law and Practice of Sales (pp. 67–259). The footnotes to the precedents remain voluminous and often carry the law much further than the preliminary dissertations. In our view a good deal of space and expense could be saved by dealing drastically with this volume of learning. A precedent book is not the place from which to learn the elementary rules of conveyancing and the dissertation should be used to set out the law to which the precedents could be cross-referenced and the footnotes in large measure abandoned, or conversely the preliminary dissertation could be eliminated almost entirely. In particular, the summary of the 1925 Legislation, useful enough as it undoubtedly was in the twenty-second edition, has quite gone by its utility today.

One of our reasons for disliking scattered learning such as these footnotes and dissertations tend to create, is the difficulty of ensuring its adequacy. For example, on p. 683, reference is made to the Education Act, 1921, s. 115, repealed by the Education Act, 1944, without reference to the repeal, while on p. 98 the Education Act, 1944, is duly incorporated into the text. The note on p. 683 is also rendered obsolete by the Education Act, 1948, s. 1. This treatment also leads to the sort of remark: 'as the entirety in all land held in undivided shares is subjected to a trust for sale, it is not possible to have a settlement of an undivided share in land', p. 547. This is not quite correct; the Settled Land Act is only excluded when the undivided shares fall into possession and it is, in fact, one of the many incongruities of the 1925 Legislation that a settlement of an undivided share can be turned overnight from a settlement of realty into a settlement of personalty by the death of a third party who is tenant for life under the original settlement: see S.L.A., s. 36.

Similarly, in this note the reader is referred to the following cases: *Re Parker's S.E.*, *Re Norton* and *Re Sharpe's Deed of Release* for the character of a trust for sale, but on p. 582 only the two first of these cases is mentioned, and in neither case is

Re Leigh's S.E., *Re Ryder & Steadman's Cont.* and *Re Beaumont's S.E.* referred to either with or without approval.

The essential difficulty is that these footnotes are frequently too long and much too scattered to provide a satisfactory account of the law. This may present anomalies in drafting. On p. 528 it is stated that partners, because they are trustees for sale (*Re Fuller's Cont.*, noted p. 527, n. 44), must execute the conveyance themselves and not delegate by power of attorney: *Green* v. *Whitehead*. This statement carries the law of trusteeship in concurrent owners pretty far and pushes the actual decision to its farthest limits, because delegation of purely ministerial functions is always permissible and execution of a conveyance does not *normally* involve a discretion. But our further point is this. Where the precedents are of trustees selling under an ordinary trust the habendum contains the usual declaration that the purchaser takes free from the limitations under the trust notwithstanding the Law of Property Act, 1925, s. 1 (i) (ii), but when co-owners are conveying no such declaration is included. This seems to be the result of adapting precedents drafted before co-owners were necessarily trustees, but notwithstanding *Re Cook* [1948] Ch. 212 we think that advantage should always be taken of section 23 of the Law of Property Act and that the beneficial interests of co-owners arising after 1925 should never be disclosed even if it involves appointment of a new trustee to an otherwise non-existent trust for sale.

These random reflections were called forth by recollections of the great changes which we have seen in our lifetime in the *form* of conveyancing drafts. It is no doubt good that these changes should come, but if we adopt them at all we should do so with the utmost boldness. Half measures are probably the most dangerous in conveyancing as in more active pursuits in life. Furthermore, they should be justified by the exposition of the law. This probably calls for more than a footnote, but if that is so the dissertation needs to be argumentative and thorough and not an outline. When the planning changes have also to be incorporated this will be even more the case, because the foundations are not laid in the old law—indeed they do not seem to be laid at all. We hope, therefore, that the learned editor will give us the benefit of his learning and experience in rather more drastic revision than has been accorded this edition. And we suggest that registered land can only be dealt with adequately if it is dealt with separately. Having said this we should add that from our tests we do not find any serious omission in bringing the volume up to date. Users of this set of precedents will find that what was required in this edition in that respect has been done. No doubt the essential changes called for by the Planning Legislation will be forthcoming without too much delay.

H. P.

Snell's Principles of Equity. Twenty-third edition. By R. E. Megarry, m.a., ll.b., of Lincoln's Inn, Barrister-at-Law. [London : Sweet & Maxwell, Ltd. 1947. cxxiv and 606 and (index) 27 pp. 37s. 6d. net.]

The author or editor of a textbook on general Equity is confronted *in limine* with a difficult problem of selection. In his preface Mr. Megarry indicates that, while he has left the substance of the present edition practically unchanged, he contemplates considerable alterations in the future, on which he invites opinions. Lacking space to give reasons, the present reviewer can only indicate that in his opinion the changes proposed would all, on balance, be beneficial although the evisceration of the admirably complete chapter on Specific Performance would cause some regrets, and the distinction in regard to restrictive covenants between 'the part played by Equity' and 'the detailed rules'—however sound in principle—looks difficult to apply in practice. The sections on Persons of Unsound Mind and Patents Copyrights and Trade Marks, now marked for provisional exclusion, could well go the same way.

The space obtained by these excisions Mr. Megarry proposes to use for the expansion of what is now cramped. The judicious pursuit of this purpose would remove what, from the point of view of the academic lawyer, is at present a source of disappointment. It has been unusual to find in *Snell* a satisfactory theoretical discussion of a major problem in Equity; and this defect persists in the present edition. Examples are : postponement for fraud and negligence (pp. 40–43); how far local limitations may make a trust charitable (p. 111); trustees' liability for agents (p. 188), and marshalling of securities (p. 307). This is not to say that the treatment is formally inadequate; on the contrary, the material for discussion of the difficulty is generally all at hand. What is lacking is the discussion itself, the attempt to resolve obscurities and anomalies in the light of general principle. If Mr. Megarry is indeed preparing to address himself to this task, it is welcome news; but the result would in effect be a new book, and if you are putting new wine into new bottles there is something to be said for a new label as well.

Pursuit of these engaging topics has left little space for appreciation of the admirable work that has been put into the present edition; its range and accuracy are remarkable, and so, especially is the volume of quite recent authority that has been included. The production of the book is also refreshingly good, and a search for misprints proved fruitless. It is believed that objection to the rubric 'Persons *who* the court would not appoint as trustees' (p. 140) would be overruled as pedantic and Bostonian.

Denis Browne.

Outlines of Jurisprudence. By B. R. Wise. Revised by P. H. Winfield. Sixth edition. Edited by R. W. M. Dias. [Oxford: J. Thornton & Son. 1948. 152 pp. 6s. net.]

The student will welcome this new edition of a valuable little book, which contains a useful compendium of opinions on the subject. The new editor, whilst not increasing the size of the book, has succeeded in making it even more comprehensive by the introduction of references to the work of Professors Olivecrona, Hohfeld, Goodhart and C. K. Allen among others. This advantage has been gained without any corresponding loss, as the elimination of old matter has been judicious.

It is, of course, clearly impossible to deal adequately with every topic in a work of this size, but there is, nevertheless, a high standard of accuracy. We thought, however, that Professor Clark had succeeded in demonstrating that Austin misinterpreted Blackstone in attributing to him the view that a command is general if it is addressed to a class of persons, even if it requires only specific acts (p. 12). In the discussion of status the position of Sir Henry Maine would be clarified by a reference to his limitation of status to 'status in *invito*' (p. 47). The views of Lord Atkin might well find a place in the passage on the maxim *Ignorantia iuris non excusat* (p. 60). In the chapter on Possession, the passage in the fifth edition dealing with 'the right to possess' has been omitted. This might with advantage have been retained as Kocourek's explanation of the 'Three Cases on Possession'. It would also elucidate the discussion of this difficult subject to indicate that the elements required for the continuance of possession may well be different from those required for its commencement, *pace* Salmond.

Small misprints appear at pp. 9, l. 24, for 'by men' read 'to men'; 12, l. 23 'Particularly' read 'Particular'; 30, l. 1 'the law' read 'law'; 47, l. 17 'progressive societies' read 'the progressive societies'; 65, l. 8 'Obligations' read 'obligation'; 91, l. 9 'deciding' read 'decided'.

R. N. C.

Textbook of the English Conflict of Laws. Second edition. By Clive M. Schmitthoff. [London: Sir Isaac Pitman & Sons, Ltd. 1948. xlix and 461 pp. 35s. net.]

Dr. Schmitthoff's manual on the *Conflict of Laws* has established its position as a handy work of reference for practitioners, but it is, above all, a student's textbook of outstanding merit. It owes the recognition which it has gained to the clarity and conciseness with which the learned author sets out his conclusions and to the success

which has attended the policy adopted by him of stating the results of modern research without the elaboration of subtleties, described by Lord Macmillan in the Foreword to this book, as 'metaphysical' and so apt to lead a student astray. This new edition can be recommended with confidence. The text has been revised with meticulous care and all recent developments and changes in the law are duly noted and discussed.

H. C. G.

Chorley and Tucker's Leading Cases on Mercantile Law. Third edition by Lord Chorley, m.a., of the Inner Temple, Barrister-at-Law, lately Sir Ernest Cassel, Professor of Commercial Law in the University of London, and O. C. Giles, ll.m., of Gray's Inn, Barrister-at-Law. [London : Butterworth & Co. (Publishers) Ltd. xxx and 353 and (index) 10 pp. 15s. net, postage 1s. extra.]

All students will welcome the new edition and particularly those who work without access to a law library; it is a companion volume to Stevens' *Mercantile Law.* A short statement of the rule illustrated by each leading case is given in the form of a headnote, followed by a summary of the facts, the result of the decision with appropriate verbatim extracts from the judgment, and valuable notes in which the case is contrasted with relevant cases. No extensive alteration has been made, there is a little re-organisation of material, but the notes on impossibility of performance have been re-written. Only four new cases have been added as leading cases. *Ass* v. *Benham* (1891), *Johnson* v. *Chapman* (1865), *M'Kean* v. *M'Ivor* (1870) and *Scarf* v. *Jardine* (1882), and some fifty cases have been added to the Notes. It is not an easy task to decide what recent cases should be added to a book of this kind, the reviewer would wish for more, at least in the Notes.

T. E. L.

Pitt Cobbett's Cases on International Law. Volume 1. Peace. Sixth edition by W. L. Walker, m.a., d.c.l. [London : Sweet & Maxwell, Ltd. 1947. xx and 416 pp. 37s. 6d. net.]

Soon after it was first published in 1885, *Pitt Cobbett's Cases* established itself as an indispensable companion for international-law students, and it has never had a serious rival, at any rate among the student's casebooks published in this country. Teachers and students alike will be grateful to Dr. Walker for this workmanlike and up-to-date edition of Volume 1, which includes an admirable selection of the many important cases decided since Dr. Temple Grey's edition was published in 1931. Dr. Walker has

maintained the traditional form of *Pitt Cobbett*, with its extensive notes which made it part casebook and part commentary. There is always a danger that the commentary in a casebook will eventually swallow up the cases, and Dr. Grey encouraged this tendency by printing the cases in small type and the commentary in large type: but *Pitt Cobbett* is used primarily as a casebook, and Dr. Walker has very properly returned to the original scheme in which the priority, at any rate in size of type, is given to the reports. One is left wishing that Dr. Walker had gone even further and had cut some of the commentary (much of which is not strictly relevant to the cases and more of which merely restates what is already to be found in the standard textbooks) in order to make room for fuller reports of some of the more important cases. For example, the very short report of the Island of Palmas Arbitration is insufficient to give the reader any adequate impression of the depth, elegance and importance of Huber's award. However, this is a criticism of *Pitt Cobbett* rather than of Dr. Walker, who has merely acted as a faithful editor of the book as he found it.

R. Y. J.

Das Weiss-Blav Buch zur Deutschen Bundesverfassung. By Dr. F. A. Frhr von der Heydte. [Regensburg: Josef Habel. 1948. 139 pp. 3.90.Dm.]

The author, who has previously made a name for himself in international law, examines in this book the various drafts for a new German Federal Constitution. Fundamental rights, the division of legislative competence in a Federal State, and proportional representation are some of the many topics discussed by him. Although the author pursues a strictly scholarly investigation, the title and the contents of the book indicate his own political standpoint, which is that of a Bavarian anxious to preserve the greatest possible amount of sovereignty for his home country.

K. L.

La Vie Juridique en Grèce dans les Publications parves de 1945 à 1947. Extrait du Bulletin Analytique de Bibliographie Hellénique 1947. By Georges Ténékedis. [Athens. 1948. 59 pp.]

This well-known Greek scholar has written a comprehensive survey of Greek legal literature and thought during the years 1945–47. Conceived on lines similar to those followed by the *Annual Survey of English Law*, he surveys all branches of law, and gives a critical account of the books and articles published during the period under review.

K. L.

Proceedings of the Eighth Conference of Teachers of International Law and Related Subjects. Held at Washington D.C., April 24–5, 1946. [Washington : Carnegie Endowment for International Peace. 1946. $1.00.]

This is a verbatim record of the proceedings of the eighth in a series of conferences which have been held over the past thirty-two years. Much of it is of course concerned, as such records must be, with matters of procedure and organisation which are of no general interest. Much of it again is necessarily devoted to that kind of tentative diffuse discussion that is often stimulating to listen to but looks rather pointless in print. However, there are also interesting reprints of papers on the teaching of international law in the post-war world, on the United Nations Educational, Scientific and Cultural Organisation, the United Nations Assembly meeting in London, and United Nations source material. Particular mention must be made of an excellent and important paper on 'The impact of scientific discovery and technological change on international relations' by Edwards Mead Earle of the Institute for Advanced Study at Princeton.

R. Y. J.

Adat Law in Indonesia. By B. ter Haar. Translated with an Introduction by E. A. Hoebel & A. A. Schiller. Institute of Pacific Relations. 1948. xiv and 248 pp. and (index) 7 pp. $4.00.]

This work, originally sponsored by the Southeast Asia Institute, chiefly consists of a translation of the greater part of a book entitled *Beginselen en Stelsel van het Adatrecht* (J. B. Wolters, Groningen and Batavia, 1939) in which the Dutch jurist B. ter Haar submits the Adat (customary or native) law of Indonesia to a systematic analysis. It is offered by its two American editors (the one an anthropologist and the other a lawyer) as 'an authoritative study of the law of the native peoples of a society which, although on the brink of entering into modern world civilisation, has retained much of its traditional life and thought'—together with an 'interpretative introduction' on the ethnological background, law in the native culture, and the place of Adat law in the legal system.

The study will be of interest to a wide variety of readers. To the sociologist the chief value will be in the detailed examination of social organisation, marriage customs, land rights, social delicts, etc.; to the Colonial lawyer in the change of Dutch policy with regard to Adat law, the parallel development of 'Government Justice and Native Justice', the combination of a personal law

peculiar to different elements in the population with statute law which is of general application, and the problems which arise when the customary law of delict comes into conflict with official penal justice; and to the comparative lawyer in the fascinating way in which foreign (chiefly Islamic) legal concepts and institutions have sometimes been incorporated into and transformed by indigenous customs or sometimes maintained as a separate and alternative system.

J. N. D. A.

El Control de la Ejecucion del Presupuesto en el Uruguay. By A. Pastori. Second edition. [Montevideo. 1948. 217 pp.]

The subject of this book is the control of the budget and of governmental expenditure according to Uruguayan law. The author examines in turn supervision by Parliament, by executive organs, administrative tribunals and by the ordinary courts. His conclusions are not altogether favourable in so far as this control is entrusted in Uruguay to special organs, whether they derive their authority from the legislature or from the administration. On the other hand it appears that the author finds much to recommend in the solution worked out in England. The book provides a comprehensive survey of the development of budgetary control in Uruguay from the foundation of the Republic until the present day, and frequent references to the practice of other countries bring the position in Uruguay into clear perspective.

K. L.

Zivilprozessrecht. By Dr. A. Schönke. Fifth edition. [Karlsruhe: Verlag C. F. Müller. 1948. xiii and 443 pp. Dm.16.]

Zwangsvollstreckungsrecht. By Dr. A. Schönke. Fourth edition. [Karlsruhe: Verlag C. F. Müller. 1948. x and 279 pp Dm.9.]

These two textbooks on the law of procedure and execution in Germany are the first to appear since the war as far as the reviewer is aware. First published after the accession of Hitler, they have been brought up to date by the inclusion of developments up to 1946 and constitute a reliable guide. The style and the exposition are clear. The arrangement is satisfactory both from the didactical and the practical point of view. The law of procedure has been the object of much theoretical speculation on the Continent, but the present volumes have succeeded in balancing

the needs of a theoretical exposition with those of a practical introductory treatise. In form and method they recall to the mind of the reader the now somewhat obsolete textbook by Rosenberg (*Lehrbuch des Deutschen Zivilprozessrechts*, 1931) which may be regarded as replaced by this new work.

K. L.

Lincoln's Inn: Its History and Traditions. By Sir William Ball, o.b.e. [London: Stevens & Sons, Ltd. 1947. 285 pp. 10s. 6d. net.]

Sir William Ball, who at the date of publication was King's Remembrancer, is greatly loved in Lincoln's Inn for the wit and kindliness which even a short conversation with him reveals. His many friends are delighted that he has written this book, which might well be cited his Table Talk, so clearly does it bring his personality before one as one reads. And he has done well to put into more permanent form what he wrote so charmingly some years ago in *The Law Times*, about the life of a young barrister in the nineties. Perhaps it was a mistake to suggest in the title that it is a history of Lincoln's Inn: it is hardly that. And it must not be taken seriously as 'authority', for the writer has largely trusted his memory. And it has sometimes played him false, as in his most misleading account of Lord Haldane's career (pp. 133–5). But the book has atmosphere and charm, which will cause it to be treasured.

H. A. H.

Dine Oneshin (*Criminal Law*). Vol. II. By Paltiel Dikshtein. [Tel-Aviv: School of Law and Economics. 1947. 165 pp.]

In the present volume, Dr. Dikshtein discusses the principles of criminal liability, the various chapters being on freedom of will, punishment of inanimate objects and animals, juvenile delinquency and minors, insanity, temporary mental disorders, and deaf-mutes. In each chapter, the author briefly states the evolution of the law from the Bible through the Talmud and medieval literature down to its present state, with occasional comparisons of other systems. In a book of this kind, a good deal must remain so sketchy as to be almost misleading. Nevertheless, this survey is of great value and interest, and adds to the debt we are already owing to its author for work done or sponsored.

David Daube.

French-English Dictionary of Legal Words and Phrases. By A. W. Dalrymple, M.A. Second edition. [London : Stevens & Sons, Ltd. 1948. v and 130 pp. 12s. 6d. net.]

The second edition of this work must be welcomed by all those who have occasion to study or to apply French law. The work has been much enlarged, and should provide an excellent help to the understanding of French legal terminology.

Final Legal Fictions. Reported by A. Laurence Polak, B.A. (Hons. Classics) London; Solicitor of the Supreme Court. Illustrated by Diana Pullinger. [London : Stevens & Sons, Ltd. 1949. iv and 102 and (Table of Cases, Statutes, Index) 15 pp. 6s. net.]

These imaginary law cases are founded on well-known stories from folk-lore and opera, and this volume is as amusing and instructive as its predecessors. The illustrations are most apt. Some of the finer points of law are admirably handled, and the cases are little masterpieces of humour and instruction. The book can be enjoyed by the layman, the law student and the lawyer.

T. E. L.

A Historical Conspectus of Roman Law, 753 B.C. to A.D.; for the use of students. By R. E. Lee, Reader in Roman Law and Roman-Dutch Law of the Inns of Court. [London : Sweet & Maxwell, Ltd. 1948. iii and 44 pp. 2s. 6d. net.]

This little book should be of great value to students of Roman law and Roman-Dutch law, for it gives them a background of Roman history and shows them the continuity and vitality of Roman law in various legal systems from the period of the Monarchy.

Turner's Index to the Companies Act, 1948. Tenth edition. By Cecil W. Turner, of Lincoln's Inn, Barrister-at-Law, assisted by Peter Gardiner, LL.B. [London: Solicitors' Law Stationery Society, Ltd. 1948. 364 and (index) 102 and (tables) 15 pp. 15s. net.]

The Companies Act, 1948, with its four hundred and sixty-two sections and eighteen Schedules covering three hundred and sixty-four pages, is despite its short section titles not easy to find one's

way about, and after long and tedious labour, a section or subsection on a particular topic may easily be overlooked. This cannot happen with the aid of this *Index*; it contains the whole Act and a comprehensive index of one hundred and two pages which enables a quick and complete reference and cross reference to be made to everything relevant to a particular point. It is really well done, and the heading 'Definitions' covers nearly four pages giving section and page reference to over one hundred and fifty words and phrases. The three Tables give easy reference to sections of the Acts repealed by the Act of 1948.

Prisoners of War. A Symposium. Institute of World Polity. [School of Foreign Services, Georgetown University. Washington, D.C. 1948. 98 pp. $1.50 net.]

This is a symposium which, though prepared on unorthodox lines, is of great usefulness. It is the result of discussions, held under the auspices of the Institute of World Polity, of students of Georgetown School of Foreign Service who had been prisoners of war. The object of the discussion was to exchange information and, by reference to it, to consider suggestions for improving the existing law with regard to the treatment of prisoners of war. The experience of the Second World War showed that the Prisoners of War Convention of 1929 is in need of revision in many vital respects. The result of the discussions of which an account is given in the little book under review fully justifies the novel idea of its promoters. The revision of the Conventions of 1929 on the treatment of sick and wounded and of prisoners of war has been for some time the subject of a concerted effort of the International Red Cross Committee—a body of great efficiency and statesmen-like foresight—and of various governments. An international conference is to be held in the summer of 1949 for the purpose of adopting a new Convention and discussions such as those embodied in this book are bound to be helpful.

Some of those participating in the discussion rightly raised the question whether the International Red Cross is to remain the only protective agency for prisoners of war. Suggestions were made for associating with that task neutral governments and non-governmental bodies. The possibility of a global war which may sweep aside neutralities as well-established as that of Switzerland cannot be disregarded. Part of the discussion was devoted to problems arising out of the new developments in aerial warfare and the use of aircraft generally. The question of commando troops and of spies and saboteurs dropped from aircraft is highly relevant in this question. Does the pilot of an aircraft carrying a spy become an accessory to the crime of espionage and liable to punishment if his

machine is forced down over enemy territory? This and similar questions led the discussion group to the problem of war crimes in relation to the Geneva Convention. There is, in the first instance, the question whether prisoners of war accused of war crimes are entitled to the benefits of the Convention in the matter of judicial safeguards. There is, secondly, the question of the procedure to be followed in respect of the punishment for war crimes arising out of the violation of this and other humanitarian conventions. If the proposed convention on the protection of civilian population in occupied territory and otherwise materialises, then the breaches of the humanitarian conventions will cover most of the possible war crimes. The question of the appropriate procedure for the punishment of war criminals will thus arise once more not in the abstract, but as a matter of the enforcement of the humanitarian conventions. The prospects of an international criminal court must, in this connection, continue to be slender. The existing procedure of trial by the military courts of the belligerents is open to obvious objections and cannot be regarded as a satisfactory or permanent solution. The latter can be brought about, in the present state of international organisation, only by means of belligerent tribunals reinforced by the participation of a substantial neutral element (assuming always that there will be neutrals). The objections to some such solution are not insurmountable. A beginning in that connection was made after the Second World War when the regulations governing the British and some other Commonwealth military courts for the adjudication of war crimes provided, in some cases, for the participation of members of allied forces. The discussion in the Study Group revealed also the necessity of considering what shall constitute a war crime for the purposes of the Convention. It was pointed out, not without some opposition, that even such seemingly technical offences as failure to keep adequate lists of prisoners of war may be responsible for suffering and anguish justifying the inclusion of such and similar acts or omissions among war crimes.

H. L.

Federal Protection of Civil Rights—Quest for a Sword. By Robert K. Carr. [Ithaca, New York: Cornell University Press. London: Geoffrey Cumberlege, The University Press. 1947. 284 pp. 16s. net.]

A Study of Judicial Review in Virginia, 1789–1928. By Margaret Virginia Nelson. [New York: Columbia University Press. London: Geoffrey Cumberlege, The University Press. 1947. 249 pp. 16s. net.]

It is convenient to review these two books together for, to a large extent, they are both concerned with the question of protection of

civil rights. In *Pollock* v. *Williams* ((1944) 322 U.S. 4) a case in which the Supreme Court declared to be invalid a Florida statute on the ground that, in effect, it sanctioned involuntary servitude contrary to the Thirteenth Amendment of the Constitution, Mr. Justice Jackson referred to the protection enjoyed by the citizen of the United States in the matter of his civil rights as being the protection of 'both a shield and a sword'. Judicial review is the shield. Positive and remedial action by the Federal Government is the sword. Mr. Carr's able and highly informative book is devoted to the latter aspect of the question—in particular to a detailed description of the activities of the Civil Rights Section established in 1939 as a subdivision of the Department of Justice.

It is not generally recognised that the original Bill of Rights of the United States contained no provision for safeguarding the basic rights of man against encroachments by individual States as distinguished from those by Congress; that it was not until after the Civil War that the Fourteenth Amendment prohibited States from making or enforcing 'any law which shall abridge the privileges or immunities of citizens of the United States'; and that as late as 1873 the Supreme Court held in the *Slaughter-House Cases* that 'the privileges and immunities of citizens of the United States' did not include the civil liberties of the Bill of Rights. Most of these are still within the exclusive jurisdiction of the States. This fact explains a great deal—though not all—in the matter of the position of the principal racial minority in the Southern States of the United States. However, the concluding enactment of the Fourteenth Amendment—the clause of 'due process of law'—and other provisions of the Federal law have provided the Federal Government with a potent weapon—'the sword'—for giving effect to the ideas of liberty and equality of the Declaration of Independence. Mr. Carr's book is more than an informative survey, fervently written, of the way in which that weapon has been wielded by the Civil Rights Section. It is often suggestive and constructive as, for instance, when he considers the vast possibilities latent in *Missouri* v. *Holland* ((1920) 252 U.S. 416) and enabling Congress to legislate, in pursuance of a validly concluded treaty, in matters normally reserved to the jurisdiction of States. The problems involved are directly connected with the observance by the United States of the provisions of the Charter of the United Nations in the matter of human rights and fundamental freedoms. These problems are not limited to the United States. Thus, before the General Assembly of the United Nations in 1948, the representative of Canada—a Federal State—expressed doubts because of the reserved domain of the provinces as to the constitutional ability of his country to subscribe to a legally binding international bill of human rights. All students interested in this and cognate aspects of the matter will be grateful to Mr. Carr for a scholarly contribution to the subject.

Dr. Nelson's book is concerned with the operation, in the State of Virginia, of 'the shield'. Judicial review is not concerned exclusively with the protection of civil rights. In fact, Miss Nelson shows, in a careful study, that the courts of Virginia, in exercising their powers of judicial review, have been hardly concerned with the protection of civil rights. She draws a pathetic picture of 'the Negro as the meagerest of gleaners in the harvest of judicial review' (p. 210). And she reproduces the following note to a report in which a re-trial of a Negro for murder had been ordered for the second time. 'After the decision of the court granting to the prisoner another trial, an armed mob in daytime took him from the jail and hung him: And thus to punish a man whom they suspected of murder, they committed murder themselves' (p. 194). But her account of judicial review is certainly helpful even though its results are somewhat startling at first sight. Thus she is concerned to demonstrate that, contrary to the opinion held generally in respect of judicial review, Virginian courts had not retarded measures of social legislation. However, the result of the investigation is not altogether paradoxical. If civil rights are in fact placed outside the purview of judicial review, then there will be no inclination to obstruct social legislation by reference to the inalienable rights of man. Much of the criticism of the doctrine of natural rights can be understood in terms of some such explanation.

H. L.

Allgemeine Lehren des Staatsangehörigkeitsrecht. By Alexander N. Makarov. [Stuttgart: Verlag W. Kohlhammer. 1947. 397 pp. 21 German marks.]

This is one of the most valuable books on the international aspects of the law of nationality. While publications in this field have been limited, as a rule, to the exposition of the law of a single country, Professor Makarov's treatise—for it is nothing less than a treatise—aims, and fully achieves that end, at a comprehensive comparative treatment of the subject. As such it is bound to prove of considerable usefulness in any future effort at completing the codification of international law in the matter of nationality.

The book opens with a general discussion of the concept of nationality, with special reference to the legal position in countries which recognise a variety of nationalities in relation to the same state. That chapter is of particular importance for the assessment of the recent British legislation in the matter. A valuable part of the book is that devoted to the examination of the limitations which international law places upon the conferment of nationality. There follows a chapter surveying the main systems of law from the point of view of the principles governing the acquisition of

nationality. The author then gives an account of the regulation of questions of nationality by treaty. The most constructive part of the book is probably that in which the author discusses the question of the law applicable to the determination of nationality. There are in addition interesting chapters on naturalisation, nationality and proof of nationality.

The reader would have welcomed a more detailed discussion of the problems raised by the recent allied legislation in Germany abolishing German nationality legislation based, inter alia, on racial discrimination. Courts of some countries held, for a time, that the Allied measures had the effect, retro-actively, of re-imposing upon the victims of the German persecution resident abroad a nationality of which they had been effectively deprived by their State. The result was that these persons were treated as re-invested with German nationality and subjected to the disabilities and repressive measures directed against German nationals in general. English courts had no occasion to render decisions of this kind. But in *The King* v. *Home Secretary, Ex p. L.* [1945] K.B. 7 and in *Loewenthal* v. *Att.-Gen.* [1948] W.N. 66 they held that German denationalisation decrees issued during the war in Germany had no effect in England and that therefore the refugees continued to be German nationals and as such exposed to the usual disabilities of alien enemies. Professor Makarov's general discussion of the issues involved suggest that a more elastic attitude of courts would have been in accordance with the robust common sense of the common law.

H. L.

Penal Reform: A Comparative Study. By Max Grünhut. [Clarendon Press. xv and 472 and (index) 14 pp. 30s.]

This will be a very helpful book to the student of Penal Reform methods. It is also, in brief, a general history of Penology, a history and description of institutional punishment and treatment of criminals, and a discussion of some special types of criminals and their treatments: an Encyclopædia of Penal Reform, in fact.

It is a much more ambitious work than a mere book on criminals and Penal Reform. It is a comparison of all that has been done and learned in three systems, those of England, the United States and Germany. Very few people can have had the long personal experience of administering and studying these three penal systems necessary to the writing of this useful book. As a statement of what has been done, it is a Whitaker of Penal Reform.

Some of us may think that there is too much interest taken in, and too much analysis of the criminal. Now that social services have removed, in England at least, the worst of the poverty that caused the great bulk of the crime committed by

ordinary people of a century ago (a cause that no amount of 'adjustment of criminals' would in the slightest prevent) it is time to realise that prevention is better than cure. Much serious crime is now organised, and is the way of life of a group of useless parasites on society. For these, a thorough reform of the Law of Criminal Evidence and Procedure might do much to ensure a reasonable certainty of their conviction; after that their punishment need only outweigh the profit from their crimes.

The more serious danger arises in juvenile crime. This machine age has resulted in reducing life for the great majority of people to unbearable dullness. The adult counteracts this by taking to hobbies or drink or religion, until he discovers that cultivating friendships within the dullness is a pleasant palliative. A child has little help from most of these things; and children, left to themselves, do not always make desirable friendships; they admire the gang leader.

Serious crime is not prevalent on the countryside, it is a product of the towns. People start life much alike in their desires and reactions. If we could extend the surroundings that provoke the best reactions, family affections, intelligent teaching, decent housing, and plenty of places in which to play, we would do more towards stopping crime than penal reformation and adjustment of made criminals will ever do. By all means teach the criminal to have a sense of responsibility towards society, and refit him for a place in life; but penal reformers will be out of a job when people live under conditions that do not any longer make criminals.

There is not much point in preaching at children or in treating them as heroes; it is simpler to treat them as equals. The bad boy of the district becomes a very nice little man when he is asked to join a family party for a day at the seaside. One wonders why the local powers that be were so vindictively assertive that he should be 'adjusted' for his sins.

H. B.

Death Duties. By K. McFarlane, ll.d., of the Estate Duty Office. [London: Stevens & Sons, Ltd. 1948. viii and 123 and (index) 4 pp. 4s. net.]

Palmer's Company Guide. A Manual of Everyday Law and Practice. Thirty-sixth edition. By J. Charlesworth, ll.d., of Lincoln's Inn, Barrister-at-Law. [London: Stevens & Sons, Ltd. 1948. x and 276 and (index) 20 pp. 6s. 6d. net.]

Palmer's Private Companies. Their Formation and Advantages and the Mode of Converting a Business into a Private Company. Forty-first edition. By J. Charlesworth, ll.d., of Lincoln's Inn, Barrister-at-Law. [London: Stevens & Sons, Ltd. 1949. viii and 98 and (index) 4 pp. 3s. net.]

Local Councils and the Citizen. By R. Simon, m.a., Assistant Solicitor, City of Kingston-upon-Hull. [London : Stevens & Sons, Ltd. 1948. ix and 188 and (index) 9 pp. 5s. net.]

Marriage, Separation and Divorce. By H. B. Grant, m.a., of Gray's Inn and the South-Eastern Circuit, Barrister-at-Law; Formerly Senior Scholar, Trinity College, Cambridge; Lord Justice Holker Senior Scholar, Gray's Inn. [London : Stevens & Sons, Ltd. 1948. vii and 120 and (index) 4 pp. 4s. net.]

Partners and the Law. By Peter Elman, m.a., of the Middle Temple, Barrister-at-Law. [London : Stevens & Sons, Ltd. 1948. vii and 81 and (index) 3 pp. 4s. net.]

Landlord and Tenant. Second edition. By R. Borregaard, m.a., of the Inner Temple, Barrister-at-Law. [London : Stevens & Sons, Ltd. 1949. x and 87 and (index) 15 pp. 4s. net.]

The seven books listed above are part of a series ' This is the Law ', designed to make various branches of the law available and intelligible to the layman at reasonable prices. The student will also find them useful. Mr. McFarlane gives as simply as it is possible an outline of Death Duties, with thirty specimen assessments, and abounding perplexities are purposely avoided. Dr. Charlesworth incorporates the provisions of the Companies Act, 1948, and his name is a sufficient guarantee for the accuracy of the new edition. Mr. Simon fully achieves his object of giving the citizen a better knowledge of the extent of the powers and duties of his local council. Since the book appeared the Representation of the People Act, 1948, has made vital changes in chapter 3—Elections. Mr. Grant incorporates the effect of judicial decisions since 1946 and the changes in the practice of divorce which followed the Report of the Denning Committee. Mr. Elman maintains the high standard of accuracy and clarity. Changes made by legislation and cases, particularly with regard to farm tenancy and rent control, have been incorporated by Mr. Borregaard. He has rearranged several chapters at the suggestion of reviewers. It is an excellent production.

T. E. L.

Shawcross on the Law of Motor Insurance. Second edition. By Christopher Shawcross, of Gray's Inn, Barrister-at-Law, and Michael Lee, of the Middle Temple, Barrister-at-Law. [London : Butterworth & Co. (Publishers) Ltd. 1949. lxxxix and 752 and (index) 92 pp. 75s. net.]

Since the appearance of the first edition in 1936 many problems then raised have been solved by judicial decision and some thirty

statutes have appeared, notably the Law Reform (Contributory Negligence) Act, 1945, National Insurance (Industrial Injuries) Act, 1946, and the Law Reform (Personal Injuries) Act, 1948. But as pointed out in the Preface the most important development of all has been the creation of the Motor Insurer's Bureau, and the agreement made in 1946 between the Ministry of Transport and this Bureau representing the insurance companies, which provides an incontestable policy for practically all persons injured in a collision due to the negligence of the driver of a motor vehicle. It applies to all liability which is compulsorily insurable under the Road Traffic Acts whether the motorist concerned was insured or not. The emphasis in motor insurance cases is thus shifted from disputes between the insurers and third parties whether the accident is covered by the policy, to disputes between them as to the driver's liability, and between insurers and the assured as to the latter's liability to repay the insurers what they have paid to the third party. All this has involved a complete rewriting of the first chapter (68 pp.) dealing with the principles of the law of motor insurance, *i.e.*, principles of the law of contract, of arbitration and those affecting liability from the use of motor vehicles. This is followed by a chapter dealing with the nature and effect of the insurance contract and its peculiarities. Chapter 3 discusses insolvency and the right of third parties. The next three chapters deal with statutory provisions under Part 2 of the Road Traffic Act, 1930, the Act of 1934, the Motor Insurance Bureau and the M. I. B. agreements. Chapter 7 deals in some one hundred pages with the making of the insurance contract. Chapter 8 is a detailed analysis of each clause in a standard form, the risks and the usual conditions. The last two chapters are concerned with the operation and termination of policies, and the position of parties in regard to legal proceedings. All concerned with motor insurance will find this comprehensive treatise invaluable; it deals with the common law statutes and insurance and is a standard work of reference with a well-prepared index.

T. E. L.

Current Law Guides. [London: Sweet & Maxwell, Ltd. and Stevens & Sons, Ltd. 1948. 6s. 6d. each net.]

No. 2. *Town and Country Planning Act, 1947.* Second edition. By R. L. Doble, M.A., Solicitor, Deputy Town Clerk, Metropolitan Borough of St. Marylebone, and H. Mann, M.B.E., LL.B., Solicitor, Senior Assistant Solicitor to the Royal Borough of Kensington. viii and 118 and (index) 2 pp.

No. 4. *Valuation for Rating.* Under the Local Government Act, 1948. By C. I. V. Anderson, F.R.I.C.S., Special Rating

Diploma, Valuation Officer to the Metropolitan Borough of Battersea. xii and 76 and (index) 3 pp.

No. 6. *Compulsory Purchase and Compensation.* By R. D. Stewart-Brown, Barrister-at-Law. vi and 93 and (index) 3 pp.

This series is designed as a supplement to the invaluable service of *Current Law* by giving a general view of the substance and effect of new Acts of Parliament within a short time of their coming into operation. They are invaluable to practitioners and to those who have to deal with the subjects as part of their lecture course, for within a short compass they clarify the basic principles and the changes effected by them. They are not intended to be the final word on the subject—for with the lapse of time, more comprehensive treatises are bound to appear. To say that the *Guides* are invaluable is no exaggeration, we express a deep debt of gratitude to their industrious authors and to the publishers, for without them we should be mariners without a compass. Not only do they explain the Acts but doubts and queries are raised and answers are suggested. Specialists on the new Acts are competent to advise, but to the busy practitioner this series is indispensable, for they at least 'put one into the picture' so as to avoid pitfalls. No. 2 is complete to Statutory Instrument 1948, No. 2471 and its sixteen chapters cover the whole field of planning. No. 4 dealing with the tripartite division of dwelling houses for the purpose of rating is a specialist's job; the Act attempts to make rateable values fair not only as between ratepayers within the local authority's area, but also as between one area and another. The provisions of the eight main parts of the Act and its two schedules are lucidly explained.

No. 6 blazes the trail through the jungle of legislation from 1815 to date on compulsory acquisition and its complexities of procedure and compensation provisions. These *Guides* maintain the reputation of earlier publications, and afford the least painful method of getting to know the general effect of legislative innovations which make such profound changes in so many branches of the law.

T. E. L.

The Rent Acts. Fourth edition. By R. E. Megarry, m.a., ll.b., of Lincoln's Inn, Barrister-at-Law; Assistant Editor of the *Law Quarterly Review*, Assistant Reader in Equity to the Council of Legal Education. [London : Stevens & Sons, Ltd. 1949. xlvi and 293 and (index) 13 pp. 21s. net.]

Previous reviews of this most useful book have appeared in this *Journal*, Vol. 9, 387 and Vol. 10, 165, and we note that the third

edition became exhausted in less than eighteen months. The text has again been thoroughly revised, in fact there is little that remains unchanged. The author has no cause to be ashamed that the book has become seventy pages longer, for in addition to incorporating the effect of 150 new cases of 1947 and 1948, new statutory rules and orders and instruments, the relevant provisions of seven new Acts of Parliament, *e.g.*, the Agricultural Holdings Act, 1948, an addendum containing a summary of the Landlord and Tenant (Rent Control) Bill, he has given the lines of solution to a good number of undecided points that have come his way—a most useful feature. Up-to-dateness, accuracy, thoroughness and clarity, coupled with a reasoned solution of difficulties yet to come are the great merits of this book. He states that he has no intention of making this work 'an annual penance', but judging from the past, and the number of new cases decided since the Preface was written, and coupling with this the present view of Parliament on rent control, it is hoped that one to whom the 'Rent Acts have a real fascination' will continue his admirable service of guiding his less fortunate brethren in practice, and continue to guide them daily in the 'hasty and ill considered language' of the increasing chaotic series of Acts which are 'prematurely hastening many judges to a grave'.

T. E. L.

National Insurance and Personal Injuries. By F. N. Ball, Solicitor of the Supreme Court. [Leigh-on-Sea, Essex: The Thames Publishing Co., Ltd. 1948. xvi and 488 and (index) 20 pp. 50s. net.]

This book deals with the Ministry of National Insurance Act, 1944, with S.R.O.s up to 318/45, the Family Allowances Act, 1945 (S.R.O. 1273/46). The National Insurance (Industrial Injuries) Act, 1946 (SI 53/48) and the National Insurance Act, 1946 (S.R.O. 1400/46). The author and publishers rightly decided to publish at once and to supplement in loose-leaf form fresh regulations when they appear, for the help of a textbook is required in the very early stages of the new scheme of National Insurance. The Rt. Hon. Sir David Maxwell Fyfe, in his introduction, makes some justifiable criticism upon the form of legislation of which these Acts are a good example, namely the Minister's powers of making regulations and also on the involved language of the parliamentary draftsmen. He also defends the power of implementing Acts by regulations; it is inevitable today. Mr. Ball's commentary on the Acts, orders and instruments is clear and as comprehensive as it could be at the time of writing, and he has called attention to such draft statutory instruments which existed when the book went to press. His preliminary notes and 'Antecedents to the

Acts' giving the background of the Beveridge Report, White Papers and a summary of main provisions, bring out the fundamental changes they involve and enable one to see these Acts in their true perspective. The book should be invaluable to all who have to deal with legal and administrative problems which are bound to arise out of these important and far-reaching Acts.

T. E. L.

Notes on District Registry Practice and Procedure. By Thomas C. Humphreys. Seventh edition. [London : The Solicitors' Law Stationery Society, Ltd. 1948. vii and 82 and (index) 13 pp. 7s. 6d. net.]

This is a useful and practical guide to those engaged in District Registry practice to unravel the difficulties arising in the course of High Court actions. It is up to date on all points. The immense changes in practice in matters of detail since 1943 are outlined at pp. iv–vi.

Third Cumulative Supplement to the Law of Income Tax. Tenth edition. By E. M. Konstam. [London : Stevens & Sons, Ltd., Sweet & Maxwell, Ltd. 1949. 128 pp. 8s. 6d. net.]

The supplement incorporates the provisions of the Finance Acts, 1946, 1947, (No. 2) 1947, 1948, the regulations as to mineral deposits, double taxation, employment, post-war credits, a note on the Crown Proceedings Act, 1947, with notes on about eighty recent decisions reported to November, 1948. It will be valued by all who have to deal with income tax.

Police Law. Ninth edition. By Cecil C. H. Moriarty, c.b.e., ll.d. [London : Butterworth & Co. (Publishers) Ltd. 1948. xx and 565 (indexes 31) pp. 9s. net.]

This well-established work is an arrangement of law and regulations for the use of police officers, and is clear and accurate. The text has been thoroughly revised and brought up to date; *Christie* v. *Leachinsky* [1947] A.C. 573—a case of outstanding importance, is adequately dealt with at p. 15. The law is stated as at the end of 1947 (the book was published three months before the Criminal Justice Act, 1948). There are Tables of Cases and Statutes, a good Index and notes on Emergency Legislation.

A Handbook on Death Duties. By H. Arnold Woolley, Solicitor of the Supreme Court. [London: The Solicitors' Law Stationery Society, Ltd. 1948. xxiv and 318 and (index) 31 pp. 27s. 6d. net.]

This is a book prescribed by the Law Society for its Final Examination since 1939, and in view of important developments since 1944 this edition is particularly welcome. It is hoped that something will soon be done to adopt the reforms suggested at p. iv. The subject of Death Duties is dull and difficult, but it is one of growing importance, for some years produce two Finance Acts, invariably adding to the existing complexity. This book was in the press when the Finance Act of 1948 was but a Bill, but reference is made in the Preface to the now important sections 76 and 77 of the Act. The chapters dealing with Statutory Attack upon Evasion Schemes, Mitigating the Duties and Duty Saving Testamentary Provisions (including Hints on Drafting Wills) are noteworthy, and the important matters dealt with at pp. 287–318 will not be overlooked by practitioners. The book is accurate, readable and comprehensive, and contains sound practical advice.

Hill's Complete Law of Housing. Supplement to the Fourth edition. By John Montgomerie, b.a. [London : Butterworth & Co. (Publishers) Ltd. 1948. ix and 45 pp. 7s. 6d. net.]

The main reason for the Supplement is the effect of the Town and Country Planning Act, 1947, on the law of compensation and the increased powers of compulsory acquisition. These changes, with other matter relating to housing, are explained, the relevant parts of the statutes being given, and a noter-up provided so that the reader can see at a glance the pages of the main work that now require correction or comment.

R. M. J.

Books also received :—

The Companies Act, 1948. By S. W. Magnus, b.a., of Gray's Inn, Barrister at-Law, and Maurice Estrin, Associate of the Society of Incorporated Accountants and Auditors. London : Butterworth & Co. (Publishers), Ltd. xliii and 546 and (index) 67 pp. (32s. 6d. net).—The experience gained by the authors in preparing their annotation of the Companies Act, 1947, has served them in good stead for this bigger work on the Act of 1948. It is intended as a guide rather than an exhaustive treatise—the

publishers' pending new edition of *Buckley* will afford a complete exposition. The present work serves a very useful purpose—a clear annotation of the 462 sections and the eighteen schedules. The notes are full and they give the principles of the leading cases, and suggestions for guidance in interpreting so many of the new sections. An introduction of some 23 pp. deals with the background of the Act and sets out the main principles it introduces, so that the more important changes can be appreciated at once. The appendices, of some 100 pp. deal with Tables of repeals and replacements; specimen forms of accounts; Registration of Business Names Act, 1916, and the 1917 and 1948 Rules; Winding-up Rules, 1948 and 1929, the Companies (Forms) Rules, 1929 and 1948 and list of Forms.

The Transport Act, 1947 as it affects Road Transport. By G. W. Quick Smith, ll.b., of the Middle Temple, Barrister-at-Law. Leigh-on-Sea, Essex: The Thames Bank Publishing Co., Ltd. 1948. xvi and 338 and (index) 13 pp. (25s. net).—The author had completed this book before he was appointed Secretary and Legal Adviser to the Road Transport Executive, and he rightly warns us that it is not to be treated as an official interpretation of the Act. His purpose is to explain in non-technical language the road transport provisions to the transport operator—when his business may be taken over by the British Transport Commission, the terms of compensation; to the passenger vehicle operator, such matters as the incorporation of his stage carriages and express services in area schemes and the procedure for compensation. Though not intended to be a legal treatise—it has not the usual apparatus of a table of cases, statutes and statutory rules and orders—the lawyer will find in it the possible interpretation and explanations of the intricate provisions of the Act. It contains a clear account of the British Transport Commission, its composition, powers and duties, its five Executives which manage and operate particular services; the Area Consultative Committees and the powers of the Minister of Transport to give general direction in matters which appear to him to affect the national interests. The text of the Act relative to road transport is given with a clear exposition in simple language. Supplements will be issued when fresh regulations and material make it necessary.

Executorship Law and Accounts (Ranking, Spicer, Pegler). Seventeenth edition. By H. A. R. J. Wilson, f.c.a.a. London: Sir Isaac Pitman & Sons, Ltd. 1949. xxx and 426 and (index) 13 pp. (30s. net.)—The well-established book is primarily intended to meet the needs of the student of accountancy and is the standard textbook on that subject. It was published prior to the Finance Act, 1948, and attention may be drawn here to sections 76 and 77 of that Act (life assurance policies, relief from

double taxation) which should be noted in the long and lucid chapter on death duties. The law stated is that at the end of 1947. The book covers a wide field and is a very clear exposition. On the purely legal portions a law student might require a little more detail, but the long experience of the editor is a sufficient guarantee that it meets all the requirements of the accountancy student.

Principles of Company Law. Eleventh edition. By His Honour Alfred F. Topham, K.C., Bencher of Lincoln's Inn. London: Butterworth & Co. (Publishers), Ltd.; Shaw & Sons, Ltd. 1948. lxiv and 443 and (index) 49 pp. (15s. 6d. net).—*Topham* has been a standard textbook for generations of law students. Attention is drawn in the Preface to the fundamental changes made by the Companies Acts of 1947 and 1948. In view of the growing complexities of the subject, the author has simplified the statement of the existing law by summarising rather than setting out in full the more abstruse exceptions and qualifications accompanying nearly all the new provisions. Leading principles continue in heavy type and the substance of the more important cases is given in the text. Due attention has been given to the accountancy provisions; students of both law and accountancy will find here an accurate and clear exposition of a complicated subject.

Statute Law relating to Employment. Third edition. By F. N. Ball, Solicitor of the Supreme Court. Leigh-on-Sea, Essex: Thames Bank Publishing Company, Ltd. 1949. xii and 366 and (index) 17 pp. (25s. net).—Industrial law is a term of 'varying and relative import'; the title to this work is more satisfactory. It covers a wide field, laws for the protection of the employed, those governing associations of employers and employed and those directed to the control of employment. Little of it is now pure common law, the bulk is statutory with strong leanings towards rules and orders—witness the all-embracing Regulation for Employment Order, 1947, S.R.O. 2409/47. Part I is an elementary introduction to the branches of law; Part II is concerned with the Workmen's Compensation Acts, 1925–1945; Part III—the Factories Acts, 1937 and 1948; Part IV deals with miscellaneous employment statutes, *e.g.*, Truck Acts, Wages Councils Act, 1945; Part V is devoted to National Insurance in all its ramifications and includes, among others, six chapters on the National Insurance (Industrial Injuries) Acts, 1946 and 1948, one on the Law Reform (Personal Injuries) Act, 1948, and six on the National Insurance Act, 1946. The regulations relating to the various Acts are conveniently summarised in separate chapters. The facts and principles of about 200 cases are dealt with in the text. The work is thoroughly well done, and is to be kept up to date by Supplements.

The Law of Carriage of Inland Transport. Second edition. By Otto Kahn-Freund, ll.m., Dr.Jur. of the Middle Temple, Barrister-at-Law. London: Stevens & Sons, Ltd. 1949. xxv and 350 and (index) 7 pp. (17s. 6d. net).—When the first edition appeared in 1939 inland transport was the concern of private companies with the exception of the London Passenger Transport Board. Since the nationalisation of railways and canals and the Road Transport Act, 1947, inland transport has become a part of public law. This vital transformation has involved a thorough revision and re-arrangement of the whole of the text from private to public law. Part I, about 115 pages, is new; it analyses the structure of the industry and the principles of administrative law underlying the statutory control of all forms of inland transport. Part II, about 150 pages, dealing with the contract of carriage of goods has involved no major changes, but has been brought up to date. Part III, about 80 pages, dealing with the carriage of passengers has been much revised in the light of recent statutes and cases. The book is designed primarily for the student, but it gives the practitioner a complete and clear account of an intricate subject. The relevant provisions of eleven new statutes, especially the Road Transport Act, 1947, some twenty statutory instruments, and over a hundred cases are embodied in the text.

The Principles of Company Law. Fifth edition. By J. Charlesworth, ll.d., of Lincoln's Inn, Barrister-at-Law, Recorder of Scarborough. London: Stevens & Sons, Ltd., and Sweet & Maxwell, Ltd. 1949. xl and 334 and (index) 10 pp. (15s. net.)—Since the last edition of this most useful students' textbook in 1945 the all-embracing Companies Act of 1948 has made necessary a complete revision and re-writing of most of the book, involving an increase of some seventy pages. The great merit of this little book is that the author's experience as a teacher has enabled him to deal with the main principles and some detail, in such a way as to enable the student to get a clear view and a sound understanding of the whole subject.

Stroud's Judicial Dictionary of Words and Phrases Judicially Interpreted and of Statutory Definitions. Supplement 1930–1946. By John Burke, of Lincoln's Inn, Barrister-at-Law. London: Sweet & Maxwell, Ltd.; Stevens & Sons, Ltd. 1947. xxxvi and 640 pp. (63s. net).—This brings the main work down to the end of 1946. It contains every heading given in the main work or in the 1931 Supplement, and enables the reader at a glance to see where the subject has been dealt with and anything new about it. It deals with case law and definitions in statutes and statutory rules and orders which are of general interest. A Table of Statutes judicially considered has been added, and that invaluable publication *Current Law* contains a full list of words judicially considered

since this Supplement was published. This is a tremendous work and after dipping into it under various headings we have been well satisfied.

Education for Professional Responsibility. Pittsburgh : Carnegie Press, Carnegie Institute of Technology. 1948. x and 207 pp.—This is a report of the Inter-Professions Conference held for three days in Pennsylvania in 1948, for the interchange of experience and ideas by teachers in schools of divinity, medicine, law and business. Professor Fuller of Harvard University is concerned with 'What the Law School can contribute to the making of Lawyers' dealing with the four competing conceptions of the objectives of legal education, namely, to give the student knowledge, to impart skill, exposing the student to great minds and giving him an understanding of the processes in which the lawyer takes part. Professor Karl N. Llewelyn of Columbia University tackles 'The Current Crisis in Legal Education' and explains the misleading label 'the case system' in a stimulating and instructive manner. Dean Wilber G. Catz treats with 'Human Nature and Training for Law and Practice'.

The Secretarial Handbook. Fifth edition. By EDWARD WESTBY-NUNN, B.A., LL.B., of Lincoln's Inn, Barrister-at-Law. London : The Solicitors' Law Stationery Society, Ltd. 1948. xii and 178 and (index) 33 pp. (8s. 6d. net.)—This useful and practical guide has passed through five editions since 1926 and the present volume has been largely re-written in view of the many changes made by the Companies Act, 1948. From the overwhelming mass of material, a judicious selection has been made of those salient points which fall to the lot of the average secretary of a commercial company. Reliance is placed mainly on the provisions of the Act and sufficient case law to act as a sign post. The programmes of the principal duties falling on secretaries in the discharge of their functions of management at pp. 156–168 are particularly practical and valuable guides.

Law Reports of Trials of War Criminals. Selected and prepared by the United Nations War Crimes Commission. Vols. V, VI and VII. London : Published for the United Nations War Crimes Commission by His Majesty's Stationery Office. 1948. ix and 101 pp.; vii and 120 pp.; v and 97 pp. (5s. each, net).—Volume V contains the reports of ten cases of war crimes where the right of fair trial had been denied. Volume VI deals with the trial of Josef Altstotter and others by the United States Military Tribunal, Nuremberg, 1947, and of Ernst Flesch by the Courts of Norway, 1946–8, for crimes against humanity, 'conscious participation in a nation-wide, governmentally organised system of cruelty and injustice in violation of the laws of war and humanity, and

perpetrated by the authority of the Ministry of Justice and through the instrumentality of the courts'. Volume VII covers five trials, illustrating how the international law of war and war crimes is dealt with by military courts and by national courts and producing substantially the same results, for the ultimate decision must depend on rules of international law. This series forms a source of international law which cannot possibly be neglected.

Change of Name. Second edition. By J. F. Josling, Solicitor of the Supreme Court. London: The Solicitors' Law Stationery Society, Ltd. 1948. 27 pp. (2s. net)—This forms No. 1 of *Oyez Practice Notes* and deals in a practical and comprehensive manner with changes in the names of individuals.

Apportionments for Executors and Trustees. By J. F. Josling, Solicitor of the Supreme Court, assisted by Charles Caplin, ll.b. London: The Solicitors' Law Stationery Society, Ltd. 1948. 28 pp. (2s. net.)—This forms No. 5 of *Oyez Practice Notes*, and like the rest of the series gives a real assistance in dealing with difficulties that frequently arise but the answers to which are not otherwise readily accessible.

Agricultural Holdings. By R. Borregaard, m.a., of the Inner Temple, Barrister-at-Law. London: The Solicitors' Law Stationery Society, Ltd. 1948. 88 pp. (6s. net.)—No. 11 of *Oyez Practice Notes* is well up to the standard of its predecessors, and will be welcomed as a guide to the difficult provisions of the Agricultural Holdings Act, 1948.

The Law of Trade Unions. Third edition. By H. Samuels, m.a., of the Middle Temple, Barrister-at-Law. London: Stevens & Sons, Ltd. 1948. xv and 91 and (index) 5 pp. (6s. net).—This is a short, accurate and up-to-date guide in which the Trade Disputes and Trade Unions Act, 1946, is fully explained. The effect of *Willis* v. *Brooks* [1947] 1 All E.R. 191 is duly incorporated at p. 72.

The Law Student's Pronouncing Dictionary. London: Sweet & Maxwell, Ltd. 1948. iii and 126 pp. (8s. 6d. net).—The work is admirably done and should be a real boon to students.

'Current Law' Statutes, 1948. Part I, 11 & 12 Geo. 6, cc. 14–17, 19–29, 31; Part II, cc. 32–42; Part III, cc. 43–67; Part IV, 12 & 13 Geo. 6, cc. 1–10. London: Stevens & Sons, Ltd. 1948. 624 pp. (Annual subscription 30s.; subscribers to *Current Law* or *Chitty's Annual Statutes* 21s.; free to subscribers to *The Law Journal Reports.*)

Res Judicatæ. Vol. III. No. 3. October, 1947. The Magazine of the Law Students' Society of Victoria, University of Melbourne. Law Book Company of Australia Ppty., Ltd. (4s.).

Rivington's Epitome of the Twenty-Third Edition of Snell's Equity. Third edition. By OLIVER LODGE, M.A., of the Inner Temple, Barrister-at-Law. London : Sweet & Maxwell, Ltd. 1948. vi and 258 pp. (15s. net).—A very useful companion to *Snell*, it is up to date, coincides with the order of subjects in *Snell*, and the numbered headings and sub-headings facilitate reference from the parent to the *Epitome*.

University of Queensland Papers. The International and National Competence of Australian Parliaments to Legislate in respect of Extra-Territorial Crime (including War Crimes) : Part A, International Law; Part B, Australian Constitutional Law. By THOMAS PENBURTHY FRY, E.D., M.A., B.C.L., SC.JUR.D., of Gray's Inn, Barrister-at-Law, Senior Lecturer in Law in the University of Queensland. Vol. 1, No. 2. (Published as an original paper by the University of Queensland. 1947. 88 pp. and (index) 2 pp. (10s. 6d. net)).

The Law of Contracts in a Nutshell. With Epitomes of Leading Cases. Fifth edition. By ALAN GARFITT, LL.B., of Lincoln's Inn, Barrister-at-Law. London : Sweet & Maxwell, Ltd. 1948. xii and 103 and (index) 11 pp. (6s. 4d. net, post free).

Questions and Answers on Jurisprudence. Second edition. By P. G. OSBORN, LL.B., of Gray's Inn, Barrister-at-Law. London : Sweet & Maxwell, Ltd. 1948. viii and 138 pp. (6s. 4d. net, post free).

The Law List, 1948. Edited by LESLIE C. E. TURNER. London : Stevens & Sons, Ltd. 1948. xi and 2075 and (index) 11 pp. (15s. net).

Elements of English Law. Fourth edition. By WILLIAM GELDART, revised by Sir WILLIAM HOLDSWORTH and H. G. HANBURY, D.C.L. London : Oxford University Press. 1948. x and 210 and (index) 10 pp. (5s. net).—This classic of the Home University Library has been carefully brought up to date.

Language and Reality. A course in contemporary criticism. By MARION HOPE PARKER. London : Frederick Muller, Ltd. 1949. xviii and 181 pp. (7s. 6d. net).

Edwardian Heritage. A study in British History 1901–1906. By William Scovell Adams, m.a. London : Frederick Muller, Ltd. 1949. 239 and (index) 9 pp. (12s. 6d. net).

The Law Quarterly Review. Vols. 64 (1948), 65 (January, 1949). Editor : A. L. Goodhart, k.b.e., k.c., Professor of Jurisprudence in the University of Oxford. London : Stevens & Sons, Ltd. (7s. 6d., annual subscription 25s.).

Annals of Social Sciences. Law—Economy—Sociology. Edited by I. Czuma and H. Dembinski. Lublin, Poland : Catholic University. 1949. Vol. I. 424 pp. (In Polish).

The Library of Congress Quarterly Journal of Current Acquisitions. Vol. 5. No. 4. 1948. Legal publications cover pp. 28–40.

World Affairs. Vol. 2. (New Series). No. 4, October, 1948. Vol. 3. No. 1, January, 1949. Edited by Professor Keeton and Dr. Schwarzenberger. London : Stevens & Sons, Ltd. (10s. per annum).

Review of Polish Law. Year II. Quarterly, October, 1948, No. 3 (4). Edited by Dr. R. Langrod and published by the Ministry of Justice. Warsaw.

Informacion Juridica. Ministerio de la Justicia Comision de Legislacion Extranjera. Madrid : Nos. 64, 66, 67, 1948; Nos. 68, 69, 1949. (50 pesetas).

Revista Juridica de la Universidad de Puerto Rico. Vol. XVII. No. 2, 1947; No. 3, 1948. ($3.00 a year).

Indian Law Review. Vol. I, 1947. Vol. II, Nos. 1 and 2, 1948. Calcutta : Indian Law Publications, Ltd. (25s. per annum.)

Mississippi Law Journal. Vol. 19. Nos. 1–4. 1947–8. ($4.00).

Temple Law Quarterly. Vol. 21. Nos. 1–4. 1947–8. ($3.00).

Current Legal Thought. Vol. 14. Nos. 1–6. 1947–8. ($5.00).

Boston Law Review. Vol. 28. No. 3. 1948. ($3.00).

Florida Law Review. Vol. 1. Nos. 2 and 3. 1945. ($3.00).

Michigan Law Review. Vol. 46. Nos. 1–8. 1948. ($6.00).

California Law Review. Vol. 36. Nos. 1–3. 1948. ($4.50).

Cases on the Law of Agency. Selected and arranged by EDWIN R. KEEDY, A.B., LL.B., Professor of Law, University of Pennsylvania, and A. ARTHUR SCHILLER, A.B., A.M., J.D., Associate Professor of Law, Columbia University School of Law. Indianapolis : The Bobbs-Merrill Co. (Publishers). 1948. x and 644 and (index) 6 pp.

Cases and other Materials on Private Corporations. Selected and arranged by I. MAURICE WIRMSER and JUDSON A. CRANE. Indianapolis : The Bobbs-Merrill Co. (Publishers). 1948. xiii and 1033 and (index) 21 pp. ($7.00 net).

Cases on Labor Law. By ARCHIBALD COX, Professor of Law, Harvard University. Brooklyn : The Foundation Press, Inc. 1948. xxxiv and 1421 and (index) 10 pp. ($8.50 net).

Cases and Materials on Civil Procedure. By THOMAS E. ATKINSON, Professor of Law, New York University, and JAMES H. CHADBOURN, Professor of Law, University of Pennsylvania. Brooklyn : The Foundation Press, Inc. 1948. xxix and 891 and (index) 18 pp. ($8.50 net).

The Elements of Legal Controversy. An Introduction to the Study of Adjective Law. By JEROME MICHAEL, Professor of Law, Columbia University. Brooklyn : The Foundation Press, Inc. xxxi and 727 and (index) 28 pp. ($7.50 net).

International Contracts. Being the fifteenth lecture on the David Murray Foundation in the University of Glasgow delivered on March 4, 1948. By G. C. CHESHIRE, Vinerian Professor of English Law, Oxford, Master of the Bench of Lincoln's Inn. Glasgow : Jackson, Son & Co. (Publishers to the University). 1948. 90 pp. (6s. net).

British Year Book of International Law, 1947. Twenty-Fourth Year of Issue. Issued under the auspices of the Royal Institute of International Affairs. London : Oxford University Press. 1949. xiv and 520 and (index) 9 pp. (45s. net).

History of United Nations War Crimes Commission and the Development of the Laws of War. Compiled by the United Nations War Crimes Commission. London : Published by His Majesty's Stationery Office. 1948. xx and 573 and (index) 19 pp. (30s. net).

Clarke Hall and Morrison's Law Relating to Children and Young Persons, including the Law of Adoption. First Supplement to Third edition. By A. C. L. Morrison, c.b.e., Formerly Senior Clerk to the Metropolitan Magistrates' Court, and L. G. Banwell, Chief Clerk of the Metropolitan Juvenile Courts. London : Butterworth & Co. (Publishers), Ltd. 1949. x and 70 pp.

Students' Law of Conveyancing, being an exhaustive and critical enunciation of the principles of conveyancing as obtaining in British India with Forms and Precedents. Second edition by S. K. Dutt, Advocate, High Court, Allahabad. Allahabad : Universal Law House Publishers. 1948. viii and 348 and (index) 21 pp. (26s. net.)

Sarkar's Law of Evidence, in India, Pakistan and Burma. Eighth edition. By S. C. Sarkar, Formerly a Judge Calcutta Small Cause Court. Calcutta : S. C. Sarkar and Sons, Ltd. 143 and 1274 and (index) 51 pp. (Rs. 32 net.)

Emmet's Notes on Perusing Titles and on Practical Conveyancing. Thirteenth edition. In two volumes. By J. Gilchrist Smith, ll.m., Solicitor (Honours). Volume 1. London : Solicitor's Law Stationery Society, Ltd. 1949. lxxxiv and 558 and (index) 35 pp. (60s. net.)

An Historical Introduction to English Law and its Institutions. Third edition. By Harold Potter, ll.d., of Gray's Inn, Barrister-at-Law; Fellow and Dean of the Faculty of Laws of King's College, and Professor of English Law in the University of London. London : Sweet & Maxwell, Ltd. 1948. xxiv and 630 and (index) 20 pp. (37s. 6d. net.)

Retaliation in International Law. By Evelyn Speyer Colbert. King's Crown Press. London : Geoffrey Cumberlege. 1948. x and 224 and (index) 4 pp. (16s. net.)

The Electricity Act, 1947. By Sir John Dalton, of Gray's Inn, Barrister-at-Law. Reprinted from Butterworth's Annotated Legislation Service. London : Butterworth & Co. (Publishers), Ltd. 1948. vi and 257 and (index) 20 pp. (21s. net.)

Modern Equity. Fifth edition. By Harold Greville Hanbury, d.c.l., of the Inner Temple, Barrister-at-Law. London : Stevens & Sons, Ltd. 1949. xl and 742 and (index) 57 pp. (40s. net.)

The Law of Wills, including Intestacy and Administration of Assets, an Introduction to the Rules of Law and Equity Relating

to Testamentary Dispositions. Third edition. By S. J. Bailey, M.A., LL.M., of the Inner Temple, Barrister-at-Law, Fellow of St. John's College, Cambridge, Reader in Law in the University of Cambridge. London: Sir Isaac Pitman & Sons, Ltd. 1948. xxxiii and 261 and (index) 22 pp. (25s. net.)

A National Policy for the Oil Industry. By Eugene V. Rostow. New Haven: Yale University Press. London: Oxford University Press, Geoffrey Cumberlege. 1948. xvi and 148 pp. and (table of cases, table of proper names and index) 173 pp. (14s. net.)—This book is the first of a series of studies in national policy based on a programme of research organised at Yale University by the department of Economics and Political Science and Law.

The Corfu Channel Case. Reports of Judgments Advisory Opinions and Orders. Order of December 17, 1948. No. 13. 12 pp.

Reparation for Injuries Suffered in the Service of the United Nations. Order of December 11, 1948. No. 12. Leyden: Sijthoff's Publishing Co. 8 pp.

International Court of Justice. Index to the Report of Judgments, Advisory Opinions and Orders, 1947–1948. No. 14. Leyden: Sijthoff's Publishing Co. 185 pp. These reports of the International Court of Justice are given in English and in French.

Great Britain, The United States and the Future. By J. E. Tyler. London: Stevens & Sons, Ltd. 1947. (8s. net.)—This is an analysis of factors which have influenced and will influence relations between Great Britain, the United States and Russia.

Law Reports of Trials of War Criminals. Selected and Prepared by The United Nations War Crimes Commission. London: Published for The United Nations War Crimes Commission by His Majesty's Stationery Office. 1949. xi and 92 pp. (5s. net.)

An Important Chapter from the History of Legal Interpretation. The Jurisdiction of the First Supreme Court of International Justice (1922–1940). By J. P. Fockema Andreae, former Governor of H.M. the Queen in the Province of Groningen. Leyden: A. W. Sijthoff's Publishing Co. 1948. 142 and (index) 17 pp. (fl.12.50.)

Domestic Jurisdiction. The exception of Domestic Jurisdiction as a Bar to Action by the League of Nations and the United

Nations. A contribution to the study of Article 15, paragraph 8, of the Covenant and Article 2, paragraph 7, of the Charter. By C. B. H. Fincham. Leyden : A. W. Sijthoff's Publishing Co. 1948. x and 192 and (index) 4 pp.

Rayden on Divorce. Fifth edition. By F. C. Ottway, of the Probate and Divorce Registry, and J. E. S. Simon, of the Middle Temple, Barrister-at-Law, consulting editor C. T. A. Wilkinson, Registrar of the Probate and Divorce Division. London : Butterworth & Co. (Publishers), Ltd. 1949. cxxxviii and 890 and (index) 113 pp. (75s. net.)

Czechoslovakia between East and West. By William Diamond. The Library of World Affairs. London : Stevens & Sons, Ltd. 1947. xii and 249 and (index) 9 pp. (12s. 6d. net.)

Britain and Her Treaties on Belize (*British Honduras*). By Jose Luis Mendoza, translated from the Spanish by Lilly de Jongh Osborne. Publication by the Ministry for Foreign Affairs. Guatemala : C. A. 1947. 299 and (index) 2 pp.

Communications concerning articles and notes should be sent to S. J. Bailey, St. John's College, Cambridge. Books for review should be sent to The Cambridge Law Journal, *Squire Law Library, Cambridge. Communications concerning advertisements should be sent to Professor H. A. Hollond, Trinity College, Cambridge.*

It is regretted that the limited space available for book reviews has made it necessary to give no more than short notices of some of the works received for review.

The Treasurer will be glad to receive subscriptions of £1 for a series of four numbers (each 6s. net).